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# **The Criminal Evidence (N.I.) Order 1988: A Radical Departure from the Common Law Right to Silence in the U.K.?**

*[The U.S.] Constitution is a kind of bottom line beneath which the Government cannot go. Here, there is no bottom line.*

British Solicitor Gareth Pierce<sup>1</sup>

*The critical point is that the Constitution places the right of silence beyond the reach of government. The Fifth Amendment stands between the citizen and his government.*

*Ullmann v. United States*, 350 U.S. 422, 454 (1956)  
(Douglas, J., dissenting).

## **INTRODUCTION**

In November 1988, the British Parliament adopted the Criminal Evidence (Northern Ireland) Order (the Order).<sup>2</sup> The Order, which applies exclusively to Northern Ireland, amends previous common law provisions governing criminal evidence. Specifically, the Order impacts the criminal suspect's so-called "right to silence" by allowing the trier of fact to draw adverse inferences from a suspect's refusal to answer questions at the pre-trial stage or refusal to testify at trial.

The confusion and controversy surrounding the implementation of the Order reflects the muddled state of British evidence law with regard to a criminal suspect's "right to silence." By examining the Order's impact on Northern Ireland in the context of the right's historical evolution and current status in British common law, this note attempts to address the questions central to this controversy. Part I presents an overview of British common law in this area prior to the introduction of the Order. Part II offers an analysis of the relevant U.S. Supreme Court interpretations of the Fifth Amendment, which serves as a model for the right to silence. Part III analyzes the Order itself, including the background leading up to

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<sup>1</sup> Jeanne Bishop Clarizio, *Criminal Justice in The Old Bailey*, 30 N.H. BAR J. 79, 87.

<sup>2</sup> Andrew Ashworth & Peter Creighton, *The Right of Silence in Northern Ireland*, in LESSONS FROM NORTHERN IRELAND 117 (1990).

enactment and the manner in which it has affected criminal law in Northern Ireland following enactment. Part IV examines whether the Order has enacted substantive changes in the right to silence, and goes on to consider the right to silence in the broader context of the Fifth Amendment by analyzing the policy rationales for a limited "privilege" of silence and a protected "right" to silence. This Note concludes that because the right to silence at common law operates more like a privilege, the Order as currently utilized does not represent substantive change in the criminal evidence law of Northern Ireland. Moreover, because important policy rationales support a protected "right" to silence in an adversary system, the British concept of the right to silence should be reworked to more closely resemble the Fifth Amendment.

## I. AN OVERVIEW OF BRITISH EVIDENCE LAW: THE RIGHT TO SILENCE

### A. *Origins of Common Law "Right to Silence"*

Disputes over the nature of the "right to silence" itself at British common law have produced almost as much controversy and confusion as have statutory restrictions on that right.<sup>3</sup> British case law is rife with references to a criminal defendant's common law right to remain silent.<sup>4</sup> Because the British legal system operates in the absence of a written constitution,<sup>5</sup> at common law that right has been characterized in different ways and interpreted to encompass different things.<sup>6</sup> Examination of the historical evolution of the right

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<sup>3</sup> See David Dixon, *Politics, Research and Symbolism in Criminal Justice: The Right to Silence and the Police and Criminal Evidence Act*, 20 ANGLO-AM. L. REV. 27 (1992); Stephen Greer, *The Right to Silence: A Review of the Greer*, 53 MOD. L. REV. 710 (1990); J.D. Jackson, *Recent Developments in Criminal Evidence*, 40 N. IRL. LEGAL Q. 105, 106 (1989). Additionally, because Northern Ireland has been a part of the United Kingdom since the 17th century, the Northern Irish courts are bound by British common law. See generally SUSAN M. EASTON, *THE RIGHT TO SILENCE* (1991).

<sup>4</sup> See, e.g., *R. v. Lewis*, [1973] 57 Crim. App. 860, 866; *R. v. Hall*, [1971] 1 All E.R. 322, 324; *R. v. Bathurst*, [1968] 2 Q.B. 99, 104.

<sup>5</sup> See Clarizio, *supra* note 1, at 87. The rights of British citizens derive from the historical notion of an unwritten constitution, and are considered "residual," in that individuals are permitted to do whatever is not prohibited by law. *Id.* (citation omitted). A famous restatement of this principle of an "unwritten constitution" can be found in *Liverside v. Sir John Anderson*: "[i]n the constitution of this country, there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representation and responsible government which has been evolved." *Id.* (citation omitted).

<sup>6</sup> In a recent civil case heard on appeal in the House of Lords, Lord Mustill noted that "[the right to silence] arouses strong but unfocused feelings. In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin,

at common law is essential to any understanding of its current status.<sup>7</sup>

The origins of the right to silence in the common law are unclear.<sup>8</sup> Legal historians disagree as to the time period in which this right first surfaced, but the earliest formulation of what was to become the common law right to silence can be found in a Roman-canon law maxim, *nemo tenetur seipsum prodere* ("no one is bound to betray himself").<sup>9</sup> Traditional theories held that the right crept into the common law in the mid-seventeenth century, following the demise of the political courts of the Star Chamber and High Commission.<sup>10</sup> This change represented a reaction against these institutions' re-

incidence and importance . . . " *Smith v. Director of Serious Fraud Office*, [1992] 3 All E.R. 456, 463-64. Lord Mustill went on to identify six "rights" contained within the concept of "right to silence," including a "special immunity . . . possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial." *Id.* at 464.

<sup>7</sup> See Dorsey D. Ellis, Jr., *Vox Populi v. Suprema Lex: A Comment on the Fifth Amendment Privilege of the Fifth Amendment*, 55 IOWA L. REV. 829, 833-34 (1970). Justice Frankfurter, commenting on the Fifth Amendment privilege against self-incrimination, noted that "the privilege . . . is a specific provision of which it is peculiarly true that 'a page of history is worth a volume of logic.'" *Ullman v. United States*, 350 U.S. 422, 438 (1956).

<sup>8</sup> Greer, *supra* note 3, at 710; see generally M.R.T. McNair, *The Early Development of the Privilege against Self-Incrimination*, 10 OX. J. L. STUD. 66 (1990); L.W. LEVY, *THE ORIGINS OF THE FIFTH AMENDMENT* (2d ed. 1986); J.H. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* (1980).

<sup>9</sup> McNair, *supra* note 8, at 70.

<sup>10</sup> *Id.* at 66; Greer, *supra* note 3, at 710. The Court of High Commission was an ecclesiastical court established by Queen Elizabeth II and designed to enforce religious conformity. Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 73 (1988). Adopting inquisitorial procedures, including compelled interrogation upon the "oath ex officio," the Court became a powerful weapon in the prosecution of religious crime. *Id.* The oath became despised as a public symbol of the religious persecution institutionalized by the Court, for it placed accused heretics in the impossible dilemma of "either 'cutting one's throat with one's tongue' or suffering eternal damnation." *Id.* at 74 (quoting LEVY, *supra* note 8, at 330). More virulent opposition to the administration of the oath ex officio arose in the middle of the seventeenth century in another forum, the Court of Star Chamber. *Id.* Star Chamber was a criminal court and a tool of political oppression which gained infamy in the trial of John Lilburne in 1637. *Id.* at 75-76. Lilburne, charged with printing heretical and seditious books, refused to take the oath, asserting "before I swear, I will know to what I must swear." *Id.* at 76; see also Lane V. Sunderland, *Self-Incrimination and Constitutional Principle: Miranda v. Arizona and Beyond*, 15 WAKE FOREST L. REV. 171, 174 (1979). Upon being interrogated, he denied the charges and refused to answer questions relating to other offenses, stating in part: "I know it is warrantable by the law of God, and I think by the law of the land, that I may stand upon my just defence and not answer to any of your interrogatories." Sunderland, *supra*, at 175 (quoting Trial of Lilburne & Wharton, 3 How. St. Tr. 1315 (1637-45)). Lilburne was sentenced to prison for contempt, but his conviction was overturned by the House of Lords, which declared it in violation of individual liberty, the law of the land, and the Magna Carta. *Id.* The Lilburne case created great public outcry, and ultimately led to the abolition of the oath and the dismantling of both Star Chamber and High Commission. *Id.*; Benner, *supra*, at 77.

quirement of the accused's compulsory testimony upon oath.<sup>11</sup> Revisionists have disputed this theory, and there is compelling historical evidence that the right against self-incrimination was derived from an array of values, both religious and secular.<sup>12</sup> At some point during the nineteenth century, however, the notion that a criminal suspect should not be compelled to give evidence against himself, and in fact was privileged against doing so, became an accepted part of the common law.<sup>13</sup>

The evolution of right to silence jurisprudence at common law is murky, characterized by seeming contradictions and a lack of precedential tradition. Indeed, in 1977 the Court of Appeal noted that it was impossible to reconcile all of the case law.<sup>14</sup> It is clear, however that the right is not an absolute one. Although a criminal suspect is always entitled to refuse to answer police questions or even to testify at trial, there may be evidentiary consequences stemming from such a decision.<sup>15</sup> The problem lies in defining when and to what extent those consequences will arise.

Early common law authorities recognized that there were problems inherent in allowing a criminal suspect to remain silent in the face of accusations. The major problem was self-evident: common sense would appear to dictate that the failure to answer an accusation, at a time when an answer could reasonably be expected, might provide some evidence in support of the accusation.<sup>16</sup> The corollary of this maxim is that the natural reaction of the innocent suspect when confronted with an accusation is both vigorous denial and pointed assertion of innocence.<sup>17</sup> Jeremy Bentham, an influential nineteenth century legal scholar, succinctly synthesized these notions in his famous dictum: "innocence claims the right of speaking,

<sup>11</sup> *Id.* at 66; Greer, *supra* note 3, at 710. Objections to the oath were founded on historical disputes over ecclesiastical jurisdiction as well as vague notions of procedural fairness and individual dignity. See Sunderland, *supra* note 10, at 176–81. Jurist Sir Edward Coke was profoundly troubled by both the lack of specific charges brought against the accused in both courts as well as the matter of interrogation into the "secret thoughts of his heart, or of his secret opinion." *Id.* (quoting *Of Oaths Before an Ecclesiastical Judge Ex Officio*, 77 ENG. REP. 1308 (K.B. 1607)).

<sup>12</sup> For discussions of revisionist theory and the policies that shaped the formation of the right against self-incrimination, see generally Greer, *supra* note 3, at 710–11; LEVY, *supra* note 8; McNair, *supra* note 8; Benner, *supra* note 10; Sunderland, *supra* note 10, at 176–81.

<sup>13</sup> See Greer, *supra* note 3, at 710–11.

<sup>14</sup> *R. v. Gilbert*, [1977] 66 Crim. App. 237, 244; see also *R. v. Mutch*, [1973] 1 All E.R. 178, 181 ("[i]n the circumstances . . . there would be no point in reviewing the cases, some of which are not easy to reconcile. . .").

<sup>15</sup> *R. v. Chandler*, [1976] 1 W.L.R. 585, 589.

<sup>16</sup> David Wolchover, *Guilt and the Silent Suspect*, 139 NEW L.J. 306 (1989).

<sup>17</sup> *Id.*

as guilt invokes the privilege of silence.”<sup>18</sup> Because the British judiciary has been strongly influenced by this vein of thought, it has consistently interpreted the “right” as a privilege with certain inherent limitations.<sup>19</sup>

From the earliest indication of the existence of the right at common law, the judiciary has reserved for itself a limitation on that right in the form of jury instructions.<sup>20</sup> The bench has historically asserted a right to comment upon a criminal suspect’s silence in the face of accusation, or his failure to testify at trial. At the same time, the prosecution has been prohibited from commenting on silence.<sup>21</sup> The oft-cited comments of Lord Atkinson in *R. v. Christie*, are the classic expression of this principle. Atkinson stated that although silence cannot be the justification for an automatic inference of guilt, the jury could decide whether a suspect’s silence at the time of accusation amounted to an acceptance of that accusation in whole or in part.<sup>22</sup> The idea that the judiciary may comment on the extent to which inferences can be made from a suspect’s silence in the face of accusation is deeply ingrained in the common law.<sup>23</sup>

<sup>18</sup> Greer, *supra* note 3, at 719. *But see* A.D.E. Lewis, *Bentham’s View of the Right of Silence*, 43 CURR. LEG. PROB. 135–57 (1990) (arguing that Bentham’s views on the right to silence were misinterpreted historically).

<sup>19</sup> *See* Greer, *supra* note 3, at 710.

<sup>20</sup> *See R. v. Rhodes*, [1899] 1 Q.B. 77, 83 (judge under Criminal Evidence Act of 1898 has right to comment on failure of defendant to testify, the nature and degree of which rests entirely within judicial discretion).

<sup>21</sup> The 1898 Criminal Evidence Act expressly forbid prosecutorial comment upon a defendant’s assertion of the defendant’s right to silence. *See R. v. Wickham*, [1971] 55 Crim. App. 199, 201–03. This prohibition is still good law, although the number of statutory and common law exceptions is growing. For example, where there is conflict in the evidence of two co-defendants, counsel for one defendant has the right to comment on the failure of a co-defendant to give evidence. *Wickham*, 55 Crim. App. at 199. Moreover, the bench has no discretion to limit such comment. *Id.*

<sup>22</sup> *R. v. Chandler*, [1976] 1 W.L.R. 585, 588–589; *R. v. Christie*, [1914] App. Cas. 554, 554.

<sup>23</sup> In *R. v. Rhodes*, [1899] 1 Q.B. 77, judicial comment on a defendant’s silence was held to be a matter for the discretion of the trial court judge. *See* Mark Berger, *Re-Thinking Self-Incrimination Law in Great Britain*, 61 DENVER L. J. 507, 540 n.216 (1984). The confusion lies in the permissible scope of this judicial comment. *Id.*; *see also R. v. Littleboy*, [1934] 2 K.B. 408, 413–14 (“we do not think, however, that it was ever intended to lay down the proposition that a judge may not, in a proper case, comment . . .”); *Chandler*, 1 W.L.R. at 589 (“[t]he law has long accepted that an accused person is not bound to incriminate himself; but it does not follow that a failure to answer an accusation or question when an answer could reasonably be expected may not provide some evidence in support of an accusation. Whether it does will depend upon the circumstances.”). In 1992, Lord Justice Dillon of the Court of Appeal commented that “[t]he privilege against self-incrimination is so deeply entrenched in our law that any decision to curtail it or not is essentially a political decision and a matter for Parliament.” *See* Damien McCrystal, *Silence is Golden*, 142 NEW L. J. 154 (1992).

## B. *Scope and Substance of the Right at Common Law*

The extent to which judicial comment is allowed, and implicitly, the extent to which a suspect's silence may be used against him, is the subject of judicial confusion at the appellate level.<sup>24</sup> First of all, the scope of the right to silence must be determined from the facts of each individual case.<sup>25</sup> The right to silence derives its strength from the general principle of British common law that the duty to answer police questions is a moral or social one, not one imposed by the law.<sup>26</sup> Given the paradox of the existence of this principle and the countervailing notion that judges may comment at trial on silence in the face of accusation, the case law in this area is understandably inconsistent. There are, however, four factors which generally appear to influence the courts' determination of the boundaries of judicial comment: (1) the type of inference which will be drawn from the instruction; (2) the stage in which the silence is manifested, either in pre-trial police interrogation or refusal to testify at trial; (3) the presence of a solicitor; and (4) whether the criminal suspect has been administered a "caution" regarding his right to remain silent.<sup>27</sup>

### 1. Type of Inference

The relationship between the silence and the type of inference to be drawn is the most easily recognizable factor used by the courts

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<sup>24</sup> Greer, *supra* note 3, at 713; see also Berger, *supra* note 23, at 541 ("the area appears to be one in which British commentators are reluctant to commit themselves to a statement of what the law purportedly is."). For example, the Court of Appeal (Criminal Division) held in 1966 that it was clearly impermissible for the bench to comment to the effect that "because the accused exercised what is undoubtedly his right, the privilege of remaining silent, you may draw an inference of guilt." *R. v. Ryan*, [1966] 50 Crim. App. 144, 148. The court continued, however, that it was quite a different matter to say: "[t]his accused, as he was entitled to do, has not advanced at any earlier stage the explanation that has been offered to you today; You, the jury, may take that into account when you are assessing the weight that you think it right to attribute to the explanation." *Id.* Such a comment was deemed permissible.

In contrast, the same Court of Appeals just eleven years later expressed deep dissatisfaction with this distinction, noting that *both* instructions represented invitations to the jury to draw adverse inferences, though one may have been more oblique than the other. *R. v. Gilbert*, [1977] 66 Crim. App. 237, 244. Despite its discomfort with such a distinction, however, the court expressly declined to repudiate *Ryan*. See *Gilbert*, 66 Crim. App. at 244-45.

<sup>25</sup> *R. v. Chandler*, [1976] 1 W.L.R. 585, 589 (whether [silence may provide evidence in support of an accusation] "will depend on the circumstances"); *R. v. Raviraj*, [1987] 85 Crim. App. 93, 103 ("each case must be considered on its own facts").

<sup>26</sup> *Rice v. Connolly*, [1966] 2 Q.B. 414, 419.

<sup>27</sup> See *infra* notes 28-75 and accompanying text.

to determine the extent of judicial comment. Where judicial comment equates silence at any time as evidence of an acknowledgment of guilt, the extent to which the bench may direct the jury to draw direct adverse inferences appears restricted.<sup>28</sup> It is clear misdirection, and thus grounds for appeal, for a trial judge to suggest that silence is direct and convincing evidence of guilt,<sup>29</sup> or that the only way in which an accused may give his interpretation of events is to testify.<sup>30</sup> Indeed, it appears that the more direct the asserted inference, the more likely the success of a defendant's appeal on grounds of misdirection.<sup>31</sup>

Where the type of inference to be drawn is more remote, however, as in the use of silence as bolstering inferences to be drawn from the prosecution's case, the extent of proper comment is subject to greater judicial discretion.<sup>32</sup> There are two principal common law

<sup>28</sup> David Wolchover, *From Silence to Guilt: The Belatedly Mentioned Fact*, 139 NEW L.J. 428, 428 (1989); see also *R. v. Lewis*, [1973] 57 Crim. App. 860, 867 (no justification for comment which is "immediately directed to the guilt or innocence of the accused").

<sup>29</sup> *R. v. Sparrow*, [1973] 1 W.L.R. 488, 492-93. In this case, the defendant refused to testify at trial and was convicted of murdering a police officer. The disputed issue at trial related to the defendant's intent. In his "summing up" to the jury (jury instructions), the trial judge noted the failure to give evidence (testify) six times, and stated that it was not enough for the defendant to rely on his counsel's eloquence, because giving evidence in a case of this kind was in fact essential. *Id.* at 492 ("it is not essential that he should go into the witness box himself . . . and be subject to cross-examination about it. Well, he did not do so and there it is."). The Court of Appeal held that such strong comment would have been understood by the jury as an instruction that the defendant was guilty because he had not given evidence, but declined to quash the conviction. *Id.* at 493.

<sup>30</sup> *R. v. Bathurst*, [1968] 2 Q.B. 99, 106-08. In this case, a conviction for manslaughter was substituted for murder where a judge commented on the defendant's refusal to give evidence in the following manner: "[i]t may help you to reflect that your task might well have been easier if he had given evidence. He has not . . . [c]ommon sense compels you to reflect, does it not, that while he might or might not have added a great deal to the case he has abstained from making the contribution that he might have done. You may ask yourselves why. It is entirely a matter for you." *Id.* at 104-05.

<sup>31</sup> *R. v. Sullivan*, [1966] 51 Crim. App. 102, 105. In *Sullivan*, the Court of Appeal stated that a judge was not entitled in any circumstances to suggest to a jury that if a defendant were innocent, the defendant would have answered police questions instead of remaining silent. *Id.* The court went on, however, to note that it was unclear what a judge *could* say in such a situation, because "the line dividing what may be said and what may not be said is a very fine one. . . ." *Id.* Ironically, although the court held that the comment was a misdirection, it affirmed the conviction in this case because "no possible miscarriage of justice [had] occurred." *Id.* at 105-06; see also *R. v. Davis*, [1959] 43 Crim. App. 212, 215-16 (conviction quashed on appeal where judge commented, "[c]an you imagine an innocent man who had behaved like that not saying something to the police . . . [h]e said nothing."); *R. v. Naylor*, [1933] 1 K.B. 685, 685 (conviction quashed where judge, commenting on defendant's refusal to answer questions at time he was charged, remarked that "surely, if he [defendant] is innocent one would think he would . . . make his defence then and there.").

<sup>32</sup> See Greer, *supra* note 3, at 713; *R. v. Raviraj*, [1987] 85 Crim. App. 93, 103.



areas in which the judiciary may instruct the jury that adverse inferences from silence may be drawn as corroborative evidence of a criminal charge.<sup>33</sup>

The first area is a general one of evidentiary corroboration, where a suspect remains silent with regard to any explanation of suspicious conduct. For example, silence may strengthen the inference that a possessor of stolen goods is the thief or their receiver, or that a defendant who was present in someone else's house had gained entrance illegally.<sup>34</sup> Permitting inferences in such cases is only part of a broader proposition that inferences may be drawn from a defendant's unreasonable behavior when confronted with accusatory facts.<sup>35</sup>

The second major area of greater judicial discretion lies in the so-called "ambush defense" problem.<sup>36</sup> This problem occurs when a suspect waits until trial to reveal an unexpected defense, such as an alibi, to the prosecution, and his silence at earlier pre-trial questioning naturally gives rise to the perception that the later explanation has been concocted.<sup>37</sup> In such cases, one judge's indignant dictum that "a fishy story is all the worse for being stale"<sup>38</sup> appears to have historically held sway.<sup>39</sup> In *R. v. Ryan*, the Court of Appeal upheld a conviction where the judge instructed the jury that, when assessing

<sup>33</sup> But see EASTON, *supra* note 3, at 10. There is a line of precedent in the appellate courts which seems to support the proposition that comment which encourages the jury to treat silence as corroborative of other evidence adverse to the defendant is always misdirection. *R. v. Keeling*, [1942] 1 All E.R. 507, 509; *R. v. Whitehead*, [1929] 1 K.B. 99, 102. This line of cases, however, has not deterred judges from drawing such corroborative inferences. See, e.g., *Whitehead*, 1 K.B. at 102 n.1 (citing Lord Alverstone) ("The non-denial of the offence by the prisoner, when formally charged by police, is not corroboration. We are far from saying that evidence of non-denial cannot be corroboration, for in some cases the absence of indignant denial would amount to that. . .").

<sup>34</sup> *Raviraj*, 85 Crim. App. at 94; *R. v. Wood*, [1911] 7 Crim. App. 56, 58 (judge's instruction regarding defendant's failure to explain his presence in home was "a mere common sense statement" because on these facts jury was entitled to find intent if the defendant gave no satisfactory explanation); see also Greer, *supra* note 3, at 713.

<sup>35</sup> *Raviraj*, 85 Crim. App. at 103.

<sup>36</sup> Andrew Ashworth & Peter Creighton, *The Right of Silence in Northern Ireland*, in LESSONS FROM NORTHERN IRELAND 123 (1990); J.D. Jackson, *Curtailing the Right of Silence: Lessons from Northern Ireland*, 42 N. IRL. LEGAL Q. 404, 405 (1991); Greer, *supra* note 3, at 713.

<sup>37</sup> See D.J. Galligan, *Silence Reconsidered*, CURRENT LEGAL PROBS. 69, 77-78 (1988) ("[i]t is hard to resist the conclusion, which seems to be so naturally compelling, that the fact of earlier silence affects the plausibility or weight of the later explanation.") *Id.*

<sup>38</sup> Greer, *supra* note 3, at 713 (quoting *Hinton v. Trotter*, [1931] S.A.S.R. 123, 127).

<sup>39</sup> See Wolchover, *supra* note 28, at 434 ("invitations to the jury to take into account failure to mention a fact later relied on had become permissible long before 1972, as the authorities clearly show.").

defendant's disclosure of an alibi at trial, they could take into account the fact that his pre-trial silence deprived the police of an opportunity to investigate that alibi.<sup>40</sup> The "ambush defense" has consistently aroused the ire of the British judiciary when determining the extent to which the right to silence protects the criminal suspect at trial. It is important, however, to note that not all judicial comment in this context will be tolerated; again, whenever comment has involved stressing comparison with the notional behavior of the innocent, convictions have almost always been overturned.<sup>41</sup>

## 2. Stage of Silence

The stage in which the suspect exercises his right to silence influences the extent to which the jury may draw adverse inferences from this silence.<sup>42</sup> Generally, a trial judge is given much greater latitude to comment on a defendant's failure to testify than for a defendant's refusal to answer police questions.<sup>43</sup> According to the 1972 report of the Criminal Law Revision Committee, judges received broader discretion because a defendant's failure to "give evidence" (testify at trial) stood less of a chance of being misunderstood, the defendant was less likely to panic or be inadequately prepared, and his testimony was in response to a *prima facie* case.<sup>44</sup> The common law, then, implicitly regards it as relatively "fairer" to allow judicial comment on a refusal to testify rather than on a refusal to answer police questions.<sup>45</sup>

The boundaries of proper judicial comment upon a failure to give

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<sup>40</sup> *R. v. Ryan*, [1966] 50 Crim. App. 144, 147-48.

<sup>41</sup> Wolchover, *supra* note 28, at 428 ("direct invitation to infer guilt has almost always been held to be misdirection"); see *R. v. Naylor*, [1933] 1 K.B. 685, 686; *R. v. Whitehead*, [1929] 1 K.B. 99, 102.

<sup>42</sup> The Criminal Law Revision Committee, Eleventh Report, 1972, Cmnd. 4991 [hereinafter C.L.R.C. REPORT]

[It] seems that the judge is in a much stronger position even under the present law, if he thinks fit, to invite the jury to draw an adverse inference from the failure of the accused to give evidence of some matter than he is to invite them to do so from failure of the accused to mention a matter when interrogated by the police."

*Id.*; see Greer, *supra* note 3, at 715.

<sup>43</sup> C.L.R.C. REPORT, *supra* note 42, at 68.

<sup>44</sup> Greer, *supra* note 3, at 715.

<sup>45</sup> See *Haw Tua Tau v. Public Prosecutor*, [1982] 3 All E.R. 14, 18. In that case, Lord Diplock noted that "English law has always recognized the right of the deciders of fact in a criminal case to draw inferences from the failure of a defendant to exercise his right to give evidence and thereby submit himself to cross-examination." *Id.*

evidence generally lie within the province of judicial discretion,<sup>46</sup> subject to two general propositions. These propositions require that a judge, before commenting to a jury, should point out first, that a defendant is not bound to give evidence, and second, that such comment should not imply that silence can bolster a weak prosecution case.<sup>47</sup> Indeed, in *R. v. Sparrow*, the Court of Appeal stated that, subject to his "duty to be fair," if the trial judge had *not* commented in strong terms, he would have been failing in his duty.<sup>48</sup>

### 3. Presence of Solicitor

The third factor that British appellate courts have looked to is the existence of "even terms" questioning, founded on the *Chandler* decision.<sup>49</sup> In *Chandler*, the Court of Appeal stated: when persons are speaking on even terms, and a charge is made, and the person charged says nothing, and expresses no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true.<sup>50</sup> The court asserted that presence of a solicitor at a police interrogation put the suspect and police on more even terms, and thus a suspect's silence in this context could more readily be the subject of judicial comment.<sup>51</sup>

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<sup>46</sup> See *R. v. Rhodes*, [1899] 1 Q.B. 77, 83. In the seminal case in this area, the court noted that "[t]here are some cases in which it would be unwise to make any comment at all; there are others in which it would be absolutely necessary in the interests of justice that such comments should be made. That is a question entirely for the discretion of the judge." *Id.*

<sup>47</sup> *R. v. Bathurst*, [1968] 2 Q.B. 99, 107. [The]

accepted form of comment is to inform the jury that, of course, [the defendant] is not bound to give evidence . . . and that while the jury [has] been deprived of the opportunity of hearing his story tested in cross-examination, the one thing they must not do is to assume that he is guilty because he has not gone into the witness box.

*Id.*

<sup>48</sup> *R. v. Sparrow*, [1973] 1 W.L.R. 488, 495. It is the judge's duty to give the jury members the benefit of his knowledge of the law and to advise them in the light of his experience as to the significance of the evidence, and when an accused person elects not to give evidence, in most cases but not all the judge should explain to the jury what the consequences of his absence from the witness box are . . .

*id.*

<sup>49</sup> Greer, *supra* note 3, at 713-14.

<sup>50</sup> *R. v. Chandler*, [1976] 1 W.L.R. 585, 589 (quoting *R. v. Mitchell*, [1892] 17 Cox C.C. 503, 508).

<sup>51</sup> Greer, *supra* note 3, at 714; see also Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.R. 1, 11 (1986) ("If, prior to the warning a suspect and police officer are speaking on even terms, and the officer makes an accusation against the suspect which an innocent person would be expected to deny, the suspect's silence may be used as an acknowledgement that the accusation is true.") (citing *Chandler*, 1 W.L.R. at 589; R. CROSS, EVIDENCE 549 (5th ed. 1979)).

In the post-*Chandler* period, British courts have taken the “even terms” rationale one step further in allowing greater discretion for adverse inferences. Because section 58 of the Police and Criminal Evidence Act (1984) (PACE) codified the right of the criminal suspect to have access to a solicitor at any pre-trial stage, the “even terms” scenario has become the norm.<sup>52</sup> Bolstered by the impression that the presence of a solicitor inevitably hinders police work, courts have begun to strike a balance between the reinforced right of access to legal counsel and greater discretion for adverse inferences from the suspect’s right to silence.<sup>53</sup> In *R. v. Alladice*, the Lord Chief Justice of the Court of Appeal commented that the effect of section 58 of PACE was such that the “balance of fairness” between the prosecution and defense could not be maintained without permitting proper comment on the right to silence, including that of the prosecution.<sup>54</sup> In fact, the judiciary has begun clamoring in dictum for a full quid pro quo in return for enforcement of section 58 rights, in which the caution would be modified to permit adverse inferences to be drawn from silence at any time.<sup>55</sup>

#### 4. Caution

The final factor which manifests itself in the case law is whether the suspect has been given a “caution” by police alerting him of his right to silence.<sup>56</sup> The seminal case is *Chandler*, in which the Court

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<sup>52</sup> See Andrew Sanders, *Access to a Solicitor and 78 of PACE*, 87 L. SOC’Y GAZETTE 17 (1990); see also Deidre Lane, *License to Kill? PACE and Emergency Legislation in Northern Ireland* (Apr. 29, 1991) (unpublished manuscript on file with the Boston College International and Comparative Law Review). The Police and Criminal Evidence Act of 1984 (PACE 84) and its counterpart PACE 1989, which applied to Northern Ireland, attempted to codify rules of procedure for police-suspect encounters. Lane, *supra*, at 3. PACE 84 reformed arrest procedures, detention procedures, conditions for questioning and treatment of suspects by police, and certain evidentiary provisions. *Id.* Central to the legislation was section 58, which mandated a right to legal advice for most suspects in police custody. Sanders, *supra*, at 17.

<sup>53</sup> See *R. v. Alladice*, [1988] 87 Crim. App. 380, 384–85.

<sup>54</sup> *Id.* at 385.

<sup>55</sup> See *id.* at 385 (“It is high time that such comment should be permitted together with the necessary alteration in the words of the caution.”); see also A.A.S. Zuckerman, *Evidence*, in 1988 ANNUAL REVIEW OF THE ALL ENGLAND LAW REPORTS 134, 146–47 (necessary “to secure a quid pro quo for the enforcement of section 58 rights, in terms of a new right to comment adversely on the suspect’s failure to reveal a defence later sprung on the prosecution . . . and the modification of the caution to enable inferences to be drawn”) [hereinafter ANNUAL REVIEW].

<sup>56</sup> The caution, like the Miranda warning in the United States, serves to inform a criminal suspect of his right to refuse to answer questions from police. See Greer, *supra* note 3, at 712–14; EASTON, *supra* note 3, at 118–19. In England and Wales, cautions must be administered to persons in police custody in three circumstances: when grounds for suspicion that

of Appeal held that in the absence of a caution, there was no rule of law which prohibited the drawing of an inference in a criminal trial from the defendant's silence.<sup>57</sup> This apparently repudiated a contradictory line of decisions which had culminated in Lord Diplock's decision in *Hall v. R.*<sup>58</sup> These decisions rested on the premise that the right to silence was a "clear and widely known principle of common law" which existed independent of the caution, and served to protect the accused from any adverse inferences except in exceptional circumstances.<sup>59</sup> *Chandler* swept away any notion of a common law right to silence which barred the drawing of adverse inferences, leaving only the existence of the cautioning practice to preclude such inferences.<sup>60</sup>

Thus, where the caution has been administered prior to police questioning, judicial comment upon ensuing silence is much more closely scrutinized.<sup>61</sup> Indeed, in one case the Court of Appeal held that once a defendant has been cautioned, the trial judge is *required*

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they have committed an offense have arisen; upon arrest and charge; and when there have been breaks between interview sessions under caution. Greer, *supra* note 3, at 714 (citation omitted).

<sup>57</sup> Wolchover, *supra* note 28, at 434.

<sup>58</sup> *Hall v. R.*, [1971] 1 All E.R. 322.

<sup>59</sup> *Id.* at 324.

<sup>60</sup> Wolchover, *supra* note 28, at 434. In *Hall*, the Privy Council held that:

it may be in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer but in their Lordships' view silence alone on being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation.

1 All E.R. at 324. The Privy Council further remarked that, with regard to the effect of cautioning a criminal suspect,

the caution merely serves to remind the accused of a right which he already possesses at common law. The fact that in a particular case he has not been reminded of it is no ground inferring that his silence was not in exercise of that right, but was an acknowledgement of the truth of the accusation.

*Id.* The Court of Appeal in *Chandler* concluded that it had reservations about these two statements of law because they seemed to conflict with *Christie* and other earlier cases and authorities. *Chandler*, 1 W.L.R. at 589. The *Chandler* court felt that

the law has long accepted that an accused person is not bound to incriminate himself; but it does not follow that a failure to answer an accusation or question when an answer could reasonably be expected may not provide some evidence in support of an accusation. Whether it does will depend on the circumstances.

*Id.* The *Chandler* court expressly declined to follow *Hall*. *Id.* at 590.

<sup>61</sup> The 1981 Report of the Royal Commission on Criminal Procedure, which will be discussed later, noted that once a defendant has been cautioned, it is "unsafe to use his silence against him for any purpose whatever." See Van Kessel, *supra* note 51, at 13.

to instruct the jury that no inference of guilt is to be drawn from silence.<sup>62</sup> The court issued its holding reluctantly, however, and in any event did not go so far as to bar trial courts from allowing evidence of the fact that the suspect exercised his rights under the caution to go to the jury.<sup>63</sup>

It is the latter distinction which is crucial to an understanding of the right to silence in the United Kingdom at common law. For although the judge appears required to instruct the jury that no adverse inferences are to be drawn from post-caution silence, evidence of that silence will always reach the jury.<sup>64</sup> Because juries are likely to be influenced by the notion that "guilt invokes the privilege of silence" and draw inferences despite the judge's instruction, one commentator has argued that such an instruction is merely an indirect method of holding silence against a criminal defendant.<sup>65</sup>

### C. *Analysis of Common Law Right to Silence*

Thus the right to silence at common law has evolved into something which more closely resembles a privilege. Although it may be true that "the whole basis of the common law is the right of an individual to refuse to answer questions put to him . . . by a person in authority,"<sup>66</sup> the right to remain silent in the face of authority is only that: the right to remain silent, with no further guarantees. Because the judiciary has accepted the notion set forth in *Chandler* that there is no common law rule against drawing adverse inferences from silence, the appellate court cases reviewed above make it clear

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<sup>62</sup> R. v. Gilbert, [1977] 66 Crim. App. 237, 243.

<sup>63</sup> See, e.g., *id.* The Court of Appeal noted that the trial judge "rightly" told the jury that no adverse inference was to be drawn against the defendant on account of his refusal to answer questions put to him by the police. *Id.* The court went on to explain that

[t]he words of the caution made it clear that he was entitled to keep silent. As the law now stands, although it may appear obvious to the jury in the exercise of their common sense that an innocent man would speak and not be silent, they must be told that they must not draw the inference of guilt from his silence.

*Id.*; see also Van Kessel, *supra* note 51, at 13.

<sup>64</sup> Van Kessel, *supra* note 51, at 13, 137 ("it is widely recognized, however, that often the trier of fact will nevertheless draw adverse inferences from unjustified refusals to answer questions"). Moreover, evidence of post-caution silence to police questioning comes before the jury whether or not the defendant gives evidence. *Id.* at 137-38.

<sup>65</sup> See *id.* at 13-14. The Royal Commission on Criminal Procedure observed that whatever a judge may say to a jury concerning a defendant's silence, "it does not, indeed it cannot, prevent a jury or bench of magistrates from drawing an adverse inference." *Id.*

<sup>66</sup> See CIVIL LIBERTIES IN NORTHERN IRELAND 9 (Brice Dickson ed., 1990) (citing *Rice v. Connolly*, [1966] 2 Q.B. 414, 419 (while there may be a moral or social duty to assist police, there is no legal duty)).

that such inferences are legitimized by comments on silence from the bench.

Even the administration of the caution does not prevent evidence of a defendant's silence at interrogation from reaching the jury, and in any event does not affect the judge's right to comment upon that defendant's failure to testify.<sup>67</sup> The bundle of more specific legal rights<sup>68</sup> thought by some commentators to be contained in the right to silence is not recognized implicitly at common law. Most significant of all, the right protecting criminal suspects from having silence used against them has been greatly diminished.<sup>69</sup> As Lord Devlin remarked in 1958, "while the English system undoubtedly does give the accused man the right to be silent, it does nothing to urge him to take advantage of his right or even to make the course invariably the attractive one."<sup>70</sup>

Moreover, recent years have also seen an increasing number of British statutes permitting adverse inferences to be drawn from silence in specific criminal contexts.<sup>71</sup> In 1985, wide powers to compel witnesses and suspects to answer questions and cooperate with investigators, including the abolishment of a general right to silence, were given to the Department of Trade and Industry.<sup>72</sup> Similar powers were conferred upon the Serious Fraud Office in the 1987 Criminal Justice Act, after a committee study identified the right to silence as a serious obstacle to the prosecution of white collar

<sup>67</sup> See Van Kessel, *supra* note 51, at 13 n.45. Van Kessel points out that evidence of this silence is still admissible, and forms part of the circumstances which the trier of fact must assess when weighing the prosecution's evidence. See *id.* at 12; see also Glanville Williams, *The Tactic of Silence*, 137 NEW L.J. 1107 (1987) ("The law does not forbid the jury to take the defendant's silence as confirming other evidence of guilt.").

<sup>68</sup> Galligan, *supra* note 37, at 77.

<sup>69</sup> See, e.g., Sonia Purnell, *Maxwell's Fight for Silence Continues*, DAILY TELEGRAPH, Jan. 15, 1992, available in LEXIS, Intlaw Library, Allnws File. Lord Justice Dillon of the Court of Appeal recently remarked that "[y]ou get a lot of statements from high authority that the right to silence is a hallowed tradition in common law. But they are usually followed by a very big 'but,' that it doesn't apply in any case where it might be a nuisance." *Id.*; see also John T. McNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Affection, Raison D'Etre and Miscellaneous Implications*, 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 138, 167 (1960).

<sup>70</sup> Van Kessel, *supra* note 51, at 147 (citation omitted). Lord Devlin went on to defend the law as it relates to silence, stating that "this dilemma in which the law puts the suspect . . . seems to be a perfectly fair one." *Id.*

<sup>71</sup> In addition, the common law right to silence does not apply in the civil context. See *Halford v. Brookes and Another*, [1991] Q.B., THE TIMES (London), Oct. 3, 1991 (unpublished transcript opinion).

<sup>72</sup> See *A Fair Hearing for City Crimes*, 140 NEW L.J. 1669 (1990); Jane Plumptre, *The Right of Silence Disappears*, 139 NEW L.J. 1070 (1989).

crime.<sup>73</sup> Parliamentary acts designed to deter drug trafficking and money laundering have also contained such provisions.<sup>74</sup> All of these statutes have created specific duties to answer police questions, the breach of which are punishable.<sup>75</sup>

In order to more fully understand the right to silence at British common law, however, it is useful to examine a different approach to silence in the criminal law context. For reasons which will emerge later in this Comment, the most instructive comparison is with the Fifth Amendment as embodied in the U.S. Constitution.

## II. FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

The Fifth Amendment to the U.S. Constitution guarantees that "[no] person . . . shall be compelled in any criminal case to be a witness against himself."<sup>76</sup> It has been demonstrated convincingly by legal historians that this constitutional right, which has come to be known as the privilege against self-incrimination, is a direct historical descendant of the common law right to silence in Britain.<sup>77</sup> To fully understand the nature of the British "right" to silence, an examination of the Fifth Amendment is essential. As interpreted by the Supreme Court, the privilege against self-incrimination under the Fifth Amendment affords a criminal defendant a much different level of protection than that provided by its common law "father," the British right to silence.

The privilege against self-incrimination under the Fifth Amendment generally forbids any comment at trial on a criminal defendant's silence in the face of accusation, or on the defendant's refusal to testify.<sup>78</sup> The Supreme Court, however, has limited this prohibition to silence after the defendant has been given the *Miranda* warning.<sup>79</sup> Thus, both pre-arrest and post-arrest silence which precedes the

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<sup>73</sup> See Rod Fletcher & Scott Ingram, *The Right of Silence: Does It Exist in Major Investigations?*, 87 L. SOC'Y GAZETTE 19 (1990).

<sup>74</sup> See *id.*

<sup>75</sup> Greer, *supra* note 3, at 711 n.15.

<sup>76</sup> U.S. CONST. amend. V.

<sup>77</sup> See generally LEVY, *supra* note 8; James Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1966); see also N.Y. v. Quarles, 467 U.S. 649, 673 (1984) (O'Connor, J. concurring and dissenting) ("[the learning of England and certain other countries] was important to the development of the initial *Miranda* rule . . ."); *Miranda v. Arizona*, 384 U.S. 436, 458-61 (1966); *Ullmann v. United States*, 350 U.S. 422, 428 (1956) (Fifth Amendment privilege is justified to prevent a "recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality . . .").

<sup>78</sup> *Griffin v. California*, 380 U.S. 609, 615 (1965).

<sup>79</sup> *Van Kessel*, *supra* note 51, at 11.



administration of the warning may be used to impeach a defendant's testimony at trial, though it is unclear whether such silence could be used as substantive evidence of guilt where a defendant failed to testify.<sup>80</sup>

In contrast, commenting on a criminal defendant's post-*Miranda* silence or refusal to testify is constitutionally impermissible, and represents reversible error.<sup>81</sup> The seminal case prohibiting comment on the refusal to testify, *Griffin v. California*, noted that such comment is a remnant of the "inquisitorial system of criminal justice" which the Fifth Amendment outlaws.<sup>82</sup> By imposing a penalty for exercising a constitutional privilege, "[i]t cuts down on the privilege by making its assertion costly."<sup>83</sup> In addition to the idea that negative consequences inevitably diminish the right itself, the courts have also articulated two other arguments against the admissibility of evidence of silence in this context: first, that admission of such evidence is fundamentally unfair because implicit in the *Miranda* warning is a guarantee that no adverse legal consequences will flow from the exercise of that right;<sup>84</sup> and second, that the slight proba-

<sup>80</sup> *Id.*; *Fletcher v. Weir*, 455 U.S. 603, 606–07 (1982) (holding that due process is not violated where the defendant takes the stand in his own defense, and the state is permitted cross-examination of a defendant as to his/her post-arrest silence in the absence of the sort of affirmative assurance embodied in the *Miranda* warnings); *Jenkins v. Anderson*, 447 U.S. 231, 241 (1980) (holding that Fifth Amendment is not violated by the use of pre-arrest silence to impeach a criminal defendant's credibility). Both cases were distinguished from *Doyle v. Ohio* 426 U.S. 610 (1976) (holding that the use of post-arrest silence which followed *Miranda* warning violated due process), on the grounds that where the warning had been given, the government could be said to have induced silence by implicitly assuring the defendant that his silence would not be used against him. *Weir*, 455 U.S. at 606. It is therefore clear that "the receipt of *Miranda* warnings is determinative of the constitutional issue." *United States v. Massey*, 687 F.2d 1348, 1353 (10th Cir. 1982).

<sup>81</sup> *United States v. LeQuire*, 943 F.2d 1554, 1565 (11th Cir. 1991); see *Griffin*, 380 U.S. at 612. Any evidence of a defendant's post-warning silence is inadmissible at trial, either as substantive evidence or for impeachment purposes. Van Kessel, *supra* note 51, at 12. Comment on silence or failure to testify may not, however, always mandate reversal. *LeQuire*, 943 F.2d at 1554 (citing *Chapman v. California*, 386 U.S. 18, 22 (1967)). In determining whether the comment constitutes reversible error, the test is whether the defense can show that the remark was intended to comment on the defendant's silence or was of such character that a jury would naturally and necessarily construe it as a comment on the defendant's silence. *Id.* (citing *United States v. Stuart-Caballero*, 686 F.2d 890, 892 (11th Cir. 1982), *cert. denied*, 459 U.S. 1209 (1983)).

<sup>82</sup> 380 U.S. at 614 (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1963)).

<sup>83</sup> *Id.* at 615.

<sup>84</sup> See *Carter v. Kentucky*, 450 U.S. 288, 301 ("[T]he *Griffin* case stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify.").

tive value of the evidence itself is outweighed by the strong possibility of prejudice.<sup>85</sup>

The evidentiary consequences of a criminal defendant's invocation of his Fifth Amendment privilege of silence in U.S. courts are severely limited.<sup>86</sup> Indeed, the admission of evidence relating to such silence at a criminal trial is strictly prohibited where a defendant has been informed of his rights under *Miranda*.<sup>87</sup> Justice Black's concurrence in *Grunewald v. United States* eloquently summarizes the reasoning which gives rise to this interpretation of the privilege against self-incrimination:

I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution.<sup>88</sup>

Because the Constitution strictly prohibits the admissibility of any evidence relating to a criminal defendant's invocation of his Fifth Amendment privilege against self-incrimination, including comment upon silence, the U.S. "privilege" in practice functions very much like the fundamental "right" the Constitution deems it to be.

### III. THE CRIMINAL EVIDENCE (N.I.) ORDER 1988

#### A. *Background to Statutory Curtailment*

##### 1. Criminal Law Revision Committee

In 1972, the Criminal Law Revision Committee (CLRC) proposed to greatly restrict the right to silence then "enjoyed" by the accused.<sup>89</sup>

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<sup>85</sup> Van Kessel, *supra* note 51, at 12; see *Doyle v. Ohio*, 426 U.S. 610, 618 (1976); *United States v. Hale*, 422 U.S. 171, 180 (1975).

<sup>86</sup> But see *United States v. Robinson*, 485 U.S. 25, 31-32 (1987). *Griffin* does not preclude any "direct" reference by the prosecution to a defendant's failure to testify; where prosecutor is responding to defense counsel's remarks that the government had not allowed the defendant an opportunity to tell his story, and refers to the defendant's failure to testify, *Griffin* and the Fifth Amendment are not broached. *Id.*

<sup>87</sup> Van Kessel, *supra* note 51, at 13; see also *Hale*, 422 U.S. at 180.

<sup>88</sup> 353 U.S. 391, 425-26 (1957) (Black, J. concurring).

<sup>89</sup> C.L.R.C. REPORT, *supra* note 42, at 16.

Noting that the prosecution had the burden of proving guilt, the committee defined the right at common law as the right to refrain from giving evidence, as well as to be free from prosecutorial comment on this decision.<sup>90</sup> The committee recommended that the court be allowed to draw whatever inferences were proper from "ambush defense" scenarios.<sup>91</sup> In addition, silence in the courtroom and at the police station should amount to corroborative evidence where the silence was "material."<sup>92</sup> It further recommended permitting adverse inferences to be drawn from a refusal, in the absence of "good cause," to give evidence at trial, as well as a modification of the cautioning procedure to advise suspects of these implications of silence.<sup>93</sup> Reaction to the committee's recommendations was vehemently unfavorable, and the legislative thrust of the report was effectively suspended for the remainder of the decade.<sup>94</sup>

## 2. Royal Commission on Criminal Procedure

In 1981, the Royal Commission on Criminal Procedure (Royal Commission) considered the right to silence in the context of proposed changes in criminal procedure.<sup>95</sup> Its conclusions differed greatly from the CLRC's recommendations. A majority of the Royal Commission advised that the current common law on the right to silence be retained.<sup>96</sup> Despite some division, the majority based its conclusion on pre-trial testimony on two grounds: the added psychological pressure to answer increased the likelihood of damaging statements from innocent people; and the inconsistency that existed between using silence against a defendant and the prosecution's burden of proof.<sup>97</sup> In addition, it almost unanimously endorsed the right to silence at trial.<sup>98</sup> The commission's conclusions were implic-

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<sup>90</sup> *Id.* at 16 n.1.

<sup>91</sup> *Id.* at 19.

<sup>92</sup> *Id.* at 23; *see Greer, supra* note 3, at 715. The reference to "material" was not expanded upon.

<sup>93</sup> Greer, *supra* note 3, at 715 (citing C.L.R.C. REPORT, *supra* note 42, at 68-70).

<sup>94</sup> *See Greer, supra* note 3, at 715.

<sup>95</sup> THE ROYAL COMMISSION ON CRIMINAL PROCEDURE, 1981, CMND. NO. 8092 [hereinafter RCCP].

<sup>96</sup> *Id.* at 87 ¶ 4.53.

<sup>97</sup> *Id.* at 86 ¶ 4.50-4.51.

<sup>98</sup> *Id.* at 90, ¶ 4.66; *see Greer, supra* note 3, at 715. The RCCP appears to have conceived of the then-current law position as protecting the criminal suspect from adverse inferences. As

itly accepted in the codification of police powers enacted under PACE 1984.<sup>99</sup>

## B. *The Order*

### 1. Emergence of Statutory Restriction

The debate over the merits of the right to silence, somewhat subdued following the enactment of PACE 1989, re-emerged publicly in 1987. Then Home Secretary Douglas Hurd, in a lecture to the Police Foundation, expressed the government's interest in reforming the law relative to the right to silence.<sup>100</sup> By 1988, a Home Office working group had been convened to study the idea.<sup>101</sup> While the working group was in the midst of its study, the Secretary of State for Northern Ireland, Tom King, announced that, in connection with the government's efforts to combat terrorism, he would be introducing a draft Order before Parliament.<sup>102</sup> The Order was intended to curb the right to remain silent for criminal suspects in Northern Ireland by allowing courts to draw adverse inferences from silence.<sup>103</sup>

On November 8, 1988, King opened debate on the order in the House of Commons by announcing that the changes were "modest" reforms designed to counter the unfair advantage gained by criminal suspects who exercised their right to silence.<sup>104</sup> He characterized the exercise of the right as a "calculated campaign" to frustrate justice on the part of those suspected of terrorism and other serious crimes.<sup>105</sup> The changes, he asserted, were necessary to restore the balance to the criminal justice system in Northern Ireland.<sup>106</sup> He also

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has been demonstrated above, however, this is not quite where the common law stands, or stood in 1981.

<sup>99</sup> Greer, *supra* note 3, at 716.

<sup>100</sup> Ashworth & Creighton, *supra* note 2, at 122; Greer, *supra* note 3, at 716.

<sup>101</sup> Ashworth & Creighton, *supra* note 2, at 122. The 1989 Report of the Working Group on the Right of Silence ultimately recommended that they "should make more frequent and robust use of their right to comment on failure to give evidence." PHIPSON ON EVIDENCE 233 (M.N. Howard ed., 14th ed. 1990).

<sup>102</sup> Charles Hodgson & Raymond Hughes, *King Curbs Right to Remain Silent*, FIN. TIMES, Oct. 21, 1988, at 28.

<sup>103</sup> *Id.*

<sup>104</sup> Charles Hodgson, *Plan to Curb Silence Approved*, FIN. TIMES, Nov. 9, 1988, at 15.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

noted that similar changes were being considered for England and Wales.<sup>107</sup>

The opposition to the Order was vocal, but ill-prepared to combat the Order-in-Council procedure.<sup>108</sup> It passed the House of Commons after less than three hours of debate; two days later, the House of Lords also passed the Order.<sup>109</sup> Because the Order was introduced in this manner, it was both unamendable and impossible to scrutinize closely.<sup>110</sup> Moreover, the Order, thought at first to have been aimed at terrorism and other serious crimes in Northern Ireland, applied in its enacted form to all criminal suspects.<sup>111</sup> Finally, the Order was passed despite the fact the government had not yet finalized the language to be contained in the new caution.<sup>112</sup>

The Labour Party spokesman for Northern Ireland, Kevin McNamara, denounced the Order as "simplistic and repressive," stating that Parliament was overturning one of the pillars of the British system of justice.<sup>113</sup> Seamus Mallon, M.P. for Newry and Amargh in Northern Ireland, condemned the Order as a cynical attack on individual rights in an effort to solve a political problem—the Northern Ireland question.<sup>114</sup> Although there was wide opposition to the Order in the legal community, it became law on December 15, 1988.<sup>115</sup>

## 2. Scope and Substance: The Language

The Criminal Evidence (N.I.) Order 1988 restricts a criminal suspect's right to silence in four specific situations.<sup>116</sup> The first situ-

<sup>107</sup> *Id.*; Hodgson & Hughes, *supra* note 102, at 28. Although the 1989 Report of the Home Office Working Group on the Right to Silence recommended that changes similar to those promulgated in the Order be instituted in England and Wales, Parliament has yet to act. See generally A.A.S. Zuckerman, *Trial by Unfair Means—The Report of the Working Group on the Right of Silence*, CRIM. L. REV. 855 (1989).

<sup>108</sup> Hodgson, *supra* note 104, at 15; see Ashworth & Creighton, *supra* note 2, at 122–23. For a full discussion of this mechanism of delegated legislation, the order-in-council, see generally B. Hadfield, *Delegated Legislation: Problems of Accountability* (1989) (unpublished conference paper, King's College, London). *Id.* at 123 n.18.

<sup>109</sup> *Id.*; Jackson, *supra* note 3, at 108.

<sup>110</sup> Ashworth & Creighton, *supra* note 2, at 122; Hodgson, *supra* note 104, at 15 ("The changes are to be introduced by an order in council which cannot be amended by Parliament. This caused considerable unease among both Labour and Conservative backbenchers.").

<sup>111</sup> Jackson, *supra* note 3, at 108.

<sup>112</sup> Hodgson, *supra* note 104, at 122.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See *Ulster Lawyers Protest at Right of Silence Plan*, FIN. TIMES, NOV. 1, 1988, at 11; Jackson, *supra* note 3, at 108 n.4.

<sup>116</sup> See Jackson, *supra* note 36, at 405.

ation is, predictably, those cases of ambush defense or late explanation. Article three of the Order applies where a defendant fails during police questioning to mention any fact later relied upon in his defense at trial.<sup>117</sup> Adverse inferences from this omission were to be permitted where the accused, "in the circumstances existing at the time . . . could reasonably have been expected to mention" the defense.<sup>118</sup> Article three, however, contains no mention of the need to administer a caution to a suspect being questioned.<sup>119</sup>

Article four of the Order applies in the second of the four situations, where a defendant declines to testify at trial.<sup>120</sup> The bench must issue a caution, which warns the defendant of the consequences of his refusal to be sworn or answer any questions without good cause.<sup>121</sup> The trier of fact, in determining the guilt or innocence of the defendant, may draw such inferences "as appear proper" from this silence. Such silence may also be treated via adverse inference as corroborative evidence.<sup>122</sup> Finally, article four allows the prosecution, as well as the judge, to comment on a refusal to give evidence.<sup>123</sup> Both articles three and four strongly resemble recommendations made by the C.L.R.C.<sup>124</sup>

Article five applies in cases where a suspect refuses or otherwise fails to account to police for the presence of objects, substances, or marks on his person, clothing or possession or in any place in which he is at the time of his arrest.<sup>125</sup> Adverse inferences may be drawn in such an instance, but only where a constable reasonably believes that these may be attributable to the suspect's participation in a

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<sup>117</sup> *Id.*

<sup>118</sup> Jackson, *supra* note 3, at 108.

<sup>119</sup> Ashworth & Creighton, *supra* note 2, at 121.

<sup>120</sup> Jackson, *supra* note 36, at 405.

<sup>121</sup> See Jackson, *supra* note 3, at 115. The language of the Article 4 caution states:

I am also required to tell you that if you refuse to come into the witness-box to be sworn or if, after having been sworn, you refuse, without good reason, to answer any question, the court in deciding whether you are guilty or not guilty may take into account against you to the extent it considers proper your refusal to give evidence or answer any question.

R. v. Murray, Crown Court of Northern Ireland at \*6 (Cr. Ct. N. Ir., Jan. 18, 1991), available in LEXIS, Intlaw Library, Nircas File.

<sup>122</sup> EASTON, *supra* note 3, at 72.

<sup>123</sup> Jackson, *supra* note 36, at 405. The ability of the prosecution to comment upon a defendant's silence in Northern Ireland had been prohibited for sixty-five years by the Criminal Evidence (N.I.) Act 1923. *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Jackson, *supra* note 36, at 405.

crime.<sup>126</sup> In this situation, the Order requires that the constable inform the suspect of his suspicion, as well as provide a caution to warn of the consequences of refusal to explain.<sup>127</sup>

Article six follows closely on article five, in that it discusses the situation where a person fails to account to police for his presence at the scene of a crime for which that person is being questioned.<sup>128</sup> Again, the Order permits adverse inferences only where the constable has a reasonable belief that the suspect's presence at that place and at that time may be attributable to his participation in the commission of the alleged offense, and that belief is communicated to the suspect.<sup>129</sup> Articles five and six are culled from similar provisions in sections 18 and 19 of the Irish Republic's 1984 Criminal Justice Act.<sup>130</sup>

Several common threads run through the 1988 Order. First, articles 3, 5 and 6 allow inferences to be drawn from silence at any pre-trial stage, whether or not a *prima facie* case has been established.<sup>131</sup> The only limit in this context is article 2(4), which provides that the inference drawn cannot alone establish a *prima facie* case or justify a conviction.<sup>132</sup> Additionally, all of the inferences permissible under the Order relate solely both to the accused's defense, as well as to the weight of the prosecution's case.<sup>133</sup> The language of the Order permits any inference to be drawn from silence, with the only requirement being that it must "appear proper."<sup>134</sup> Finally, although a new caution was issued by the Secretary of State to apply in Northern Ireland and reflect the implications of the Order, the Order itself makes no explicit mention of a caution.<sup>135</sup> Hence it is

<sup>126</sup>Jackson, *supra* note 3, at 116; EASTON, *supra* note 3, at 73.

<sup>127</sup>Jackson, *supra* note 3, at 116; Jackson, *supra* note 36, at 405; EASTON, *supra* note 3, at 73-74.

<sup>128</sup>Jackson, *supra* note 3, at 116-17; Jackson, *supra* note 36, at 405; EASTON, *supra* note 3, at 73-74.

<sup>129</sup>Jackson, *supra* note 3, at 116-17.

<sup>130</sup>Jackson, *supra* note 36, at 405.

<sup>131</sup>*Id.* at 406.

<sup>132</sup>Ashworth & Creighton, *supra* note 2, at 119.

<sup>133</sup>Jackson, *supra* note 36, at 406; *see* Zuckerman, *supra* note 107, at 963. Although Zuckerman concludes that this distinction is an empty one, the Order does "enable inferences to be drawn to directly bolster up the prosecution case." *Id.*

<sup>134</sup>Jackson, *supra* note 3, at 115.

<sup>135</sup>*Id.* at 111. The Code of Practice on Detention and Questioning, promulgated under PACE 1989, specifies the caution to be used in relation to questioning under the Order. *See* EASTON, *supra* note 3, at 75. The suspect is advised that he may remain silent, but is warned of the significance of failing to mention facts or account for objects, marks, or his presence at a particular place. *Id.*

unclear how the Order is to be applied where a caution is not administered.<sup>136</sup>

### C. *Post-Order Right to Silence*

The Order has been generally interpreted cautiously by the Northern Ireland judiciary, although there are signs that they are becoming more comfortable with its broad application.<sup>137</sup> It should be noted here that, since 1972, most defendants charged with serious crimes in Northern Ireland receive bench trials in the so-called "Diplock courts."<sup>138</sup> Thus the trier of fact in almost all criminal trials in Northern Ireland is a judge, or a tribunal of judges.<sup>139</sup>

At the outset, the early cases showed that the open-ended language of the Order would not be interpreted recklessly. In *R. v. McDonnell*, the trial judge held that a refusal to give evidence could be used in a supportive or corroborative manner.<sup>140</sup> Such a refusal could not, however, in the absence of other evidence, be used as "primary evidence of guilt."<sup>141</sup>

Another article four case specifically identified the link between the prosecution's burden of proof and the use of adverse inferences.<sup>142</sup> In that case, the judge concluded that the failure to give evidence may justify a finding of guilt only where the prosecution's evidence already rests on the brink of beyond a reasonable doubt.<sup>143</sup>

<sup>136</sup> Ashworth & Creighton, *supra* note 2, at 124; see *R. v. McDonnell*, (Belfast Cr. Ct., Mar. 13, 1989), available in LEXIS, Intlaw Library, Nircas File.

<sup>137</sup> See generally Jackson, *supra* note 36, at 410-15. It should be noted that under the Northern Ireland (Emergency Provisions) Acts, almost all criminal defendants in Northern Ireland are tried in non-jury sessions—the so-called "Diplock" court system. See generally Stephen Greer & Antony White, *A Return to Trial by Jury*, in JUSTICE UNDER FIRE: THE ABUSE OF CIVIL LIBERTIES IN NORTHERN IRELAND 47-72 (A. Jennings ed., 1988).

<sup>138</sup> See Greer & White, *supra* note 137, at 47-72. Under the "Emergency Provisions" Acts, first promulgated in 1972 and subsequently amended several times, Parliament suspended the right to a jury trial for a wide range of criminal activity—crimes which were "though likely to be committed, in the main, by paramilitaries or their sympathizers." *Id.* at 47. Critics branded them "Diplock courts," after Lord Diplock, whose 1972 commission produced the recommendations upon which the measures were based. *Id.* Initially deemed "temporary," these and the other measures which make up the "emergency" acts aimed at terrorist activity remain, despite the constant cloud of controversy around them, the law in Northern Ireland. *Id.* at 47-72; see *infra* notes 189, 235 and accompanying text.

<sup>139</sup> See generally Greer & White, *supra* note 137, at 47-72.

<sup>140</sup> *R. v. McDonnell*, (Belfast Cr. Ct., Mar. 13, 1989), available in LEXIS, Intlaw Library, Nircas File.

<sup>141</sup> *Id.*

<sup>142</sup> See Jackson, *supra* note 36, at 410-11 (citing *R. v. Smyth*, extempore judgment, Mar. 10, 1989 (Kelly, LJ)).

<sup>143</sup> *Id.*



This holding seems to reflect an initial judicial trend toward caution, in which the bench refused to use the Order to bolster up a weak government case.<sup>144</sup> Indeed, J.D. Jackson, reader in law at Queen's University in Belfast, reported that in a number of early cases, invitations by the prosecution to the judge, sitting as tribunal of fact, to draw article four inferences have been declined.<sup>145</sup>

The Order appears to be gaining judicial adherence, however. *R. v. Martin and Others* involved the trial of several suspected members of the Irish Republican Army for false imprisonment and attempted murder of a government informant.<sup>146</sup> In *Martin*, one defendant was repeatedly interrogated regarding his presence at the scene of the alleged crime.<sup>147</sup> Although police cautioned him in connection with articles three and six of the Order, the defendant refused to answer certain potentially incriminating questions.<sup>148</sup> Later, in the witness box, he provided an exculpatory explanation for his presence.<sup>149</sup> In his opinion, the judge commented that he drew very strong inferences against the defendant under both articles for remaining silent not, as the bench saw it, out of any political attitude or matter of principle, but as a tactical decision to withhold his line of defense.<sup>150</sup>

A second case which involves a more aggressive application of the Order is *R. v. Murray*.<sup>151</sup> In *Murray*, the defendant was on trial for the attempted murder of a part-time member of the Ulster Defense Regiment, a Protestant paramilitary group.<sup>152</sup> The prosecution's case was a "circumstantial one," based on forensic evidence which allegedly connected the defendant with the get-away car as well as the discharge of a firearm.<sup>153</sup> When cautioned under articles three and five of the Order, relating to his whereabouts at the time of the crime and the forensic evidence, the accused made no reply.<sup>154</sup> At trial, the

<sup>144</sup>Jackson, *supra* note 36, at 414.

<sup>145</sup>*Id.*

<sup>146</sup>(Cr. Ct. N. Ir., May 8, 1991), *available in* LEXIS, Nilaw Library, Cases File.

<sup>147</sup>*Id.* at \*31.

<sup>148</sup>*Id.* at \*33-34.

<sup>149</sup>*Id.* at \*34.

<sup>150</sup>*Id.* at \*35. On appeal, the convictions were affirmed by the Court of Appeal. *R. v. Martin & Others*, (Court of Appeal (N.I.), July 7, 1992), *available in* LEXIS, Intlaw Library, Nircas File.

<sup>151</sup>(Cr. Ct. N. Ir., Jan. 18, 1991), *available in* LEXIS, Intlaw Library, Nircas File.

<sup>152</sup>*Id.* at \*1.

<sup>153</sup>*Id.* This evidence included mud-stained "army-type combat" trousers of the kind allegedly worn by the attackers, firearms residue on his clothing, a very small amount of fibers from a hair sample which matched those from a black mask allegedly worn by the attackers, and a fingerprint lifted off the car in which the victim was allegedly transported. *See id.* at \*2-7.

<sup>154</sup>*Id.* at \*6-7.

defendant refused to give evidence on his behalf, and the prosecution requested that the court draw inferences against him under articles 3, 4, and 5 of the Order.

The defendant in *Murray* was convicted, and in his opinion, the judge noted that he drew adverse inferences against the defendant under both articles three and four.<sup>155</sup> Although before being cautioned he had disclosed some general exculpatory facts, the judge found that his failure during interrogation to mention the particular matters which were relied on in his defense at trial, especially with respect to the "incriminating" fingerprint evidence, reduced the credibility of that defense and increased the weight of the prosecution's case.<sup>156</sup> Additionally, the judge stated that it was "remarkable" that the defendant had not given evidence, despite being warned as to the consequences of doing so.<sup>157</sup> Although it was "not the function of the court to conjure up reasons" for defendant's silence, the judge asserted that it was only "commonsense in the circumstances" to infer that he was guilty.<sup>158</sup> This inference, he concluded, was much more to the defendant's detriment than that drawn under article three.<sup>159</sup>

Additionally, the judge made some pointed comments with respect to his common law right to draw adverse inferences from a criminal defendant's silence. These comments, as well as the general scope of judicial discretion under the Order, formed the grounds for the appeal in this case. In the fall of 1991, the Northern Ireland Court of Appeal upheld the conviction.<sup>160</sup>

In its opinion, the Court of Appeal noted first that the trial judge

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<sup>155</sup> See *id.* at \*13, 18. The judge declined to draw any adverse inferences under article five. *Id.*

<sup>156</sup> *Id.* at \*13.

<sup>157</sup> *Id.* at \*18.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *R. v. Murray*, (Court of Appeal (N.I.), Oct. 25, 1991), available in LEXIS, Intlaw Library, Nircas File. The Court of Appeal noted that the trial court's statement that it was entitled under common law to draw adverse inferences in the instant case constituted error. *Id.* at \*25. It is clear, however, that the court did not wish to assess the overall state of the common law with regard to the right of silence. The court did not object to the general statements of the trial judge on this subject, including his assertion that:

[q]uite apart from the entitlement to draw adverse inferences in certain cases from the failure of an accused to offer an explanation or a satisfactory explanation to the police when questioned, there is also at common law, the right of (a) a judge to comment in appropriate cases of an accused to give evidence (b) a trier of fact, in appropriate cases, to draw adverse inferences from such failure.

*R. v. Murray*, at \*9 (Cr. Ct. N. Ir., Jan. 18, 1991), available in LEXIS, Intlaw Library, Nircas File.

was correct in interpreting the Order in light of the objectives of the 1972 Report of the Criminal Law Revision Committee.<sup>161</sup> Moreover, it upheld the inferences drawn by the trial court, and outlined in a very general manner the extent of permissible inferences under the Order, relating such inferences to judicial “commonsense.”<sup>162</sup> The court also stated that the Order permitted the drawing of appropriate adverse inferences by the fact-finder as long as a prima facie case existed, noting that the prosecution’s case need not rest “on the brink of” proving guilt.<sup>163</sup> Finally, the opinion noted that the fact-finder was not required to spell out in its judgment the precise inferences which were drawn from a criminal defendant’s silence.<sup>164</sup>

The overall effect of the Order is, however, difficult to determine. Certainly, its impact has been minimized by a prudent judiciary. The Order authorizes the trier of fact to draw inferences of guilt and corroboration which at common law were nominally prohibited. The analytical difference under the Order from the status of the right to silence at common law is debatable, however.<sup>165</sup> Commenting upon the Order in *Martin*, the judge wondered aloud whether the Order “merely removes the uncertainty of existing common law and states it with the clarity and robustness it does not appear to have.”<sup>166</sup> Although he went on to state his opinion that “significant inroads” into the right had been made by the Order, the quoted passage is telling.<sup>167</sup>

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<sup>161</sup> *R. v. Murray*, at \*28 (Court of Appeal (N.I.), Oct. 25, 1991), available in LEXIS, Intlaw Library, Nircas File.

<sup>162</sup> *Id.* at \*39, 45. The court noted that “[u]nder Article 4, it would be improper . . . to draw the bare inference that because the accused refused to give evidence in his own behalf he was therefore guilty.” *Id.* at \*39. Inferences were appropriate, however, under Article 4, where “commonsense permits;” where a prima facie case against the defendant exists, and where “there is no reasonable possibility of an innocent explanation. . . .” *Id.*

<sup>163</sup> *Id.* at \*39.

<sup>164</sup> *Id.* at \*42.

<sup>165</sup> See, e.g., Clarizio, *supra* note 1, at 86–87. The author details the 1988 pre-Order trial of William Quinn, a suspected member of the Irish Republican Army, on charges of murder and conspiracy to cause explosions. *Id.* at 79–81. Clarizio was disturbed by the judge’s comments that by failing to give evidence at trial, Quinn had not rebutted the prosecution’s case—“a disturbing departure from the presumption of innocence we believe defendants should enjoy.” *Id.* at 86–87. Because British juries, like their counterparts in the United States, do not give special verdicts, it is difficult to assess the viability of hypotheses relating to the effect of the right to silence or its curtailment in the Order.

<sup>166</sup> *R. v. Murray*, at \*9 (Cr. Ct. N. Ir., Jan. 18, 1991), available in LEXIS, Intlaw Library, Nircas File.

<sup>167</sup> *Id.* In the appeal of the *Murray* case, the Court of Appeal held that the Order *had* indeed changed the law with regard to the right to silence, but asserted this opinion on the grounds of substantive common law—it merely stated that the non-jury courts of Northern Ireland

#### IV. CRIMINAL EVIDENCE (N.I.) ORDER 1988: A RADICAL BREAK WITH THE PAST?

##### A. Objectives and Impact

The Criminal Evidence (N.I.) Order 1988 was enacted during a period of renewed debate over the general right to silence perceived to be enjoyed by criminal suspects in the United Kingdom.<sup>168</sup> Pressure from the Police Federation was at the forefront of the continued controversy.<sup>169</sup> The major criticisms of the right to silence were that it frustrated police investigation of criminal activity by discouraging confessions and otherwise legitimate inquiry, and hindered proof of guilt at trial through the ambush defense.<sup>170</sup> Moreover, it did so in a manner that was counter to common sense, as silence in the face of accusation was clearly probative.<sup>171</sup>

An examination of the assumptions which lay behind the rationale for the Order is enlightening. Tom King, architect of the Order, told Parliament during debates over the Order that, of all of those detained in Northern Ireland on charges of serious crimes, just under half refused to answer some questions, and some refused to answer any questions at all.<sup>172</sup> He gave no source for his assertion, and no figures of this kind have been empirically demonstrated.<sup>173</sup>

The empirical findings have, in reality, shown that the opposite appears to have held true.<sup>174</sup> Prior to the enactment of PACE 1984, studies cited by the 1981 Royal Commission pinned the number of criminal suspects in the United Kingdom who exercised their right to silence at pre-trial questioning at around 4 percent.<sup>175</sup> Of these, the great majority were convicted,<sup>176</sup> clearly at odds with the notion

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had, prior to the Order, considered that the law prevented them from drawing adverse inferences from an accused's failure to testify. *R. v. Murray*, at \*38 (Court of Appeal (N.I.), Oct. 25, 1991), available in LEXIS, Intlaw Library, Nircas File. The court's language implied that it was not taking a position with regard to the correctness of this notion. *See id.*

<sup>168</sup> *See Greer, supra* note 3, at 716; Williams, *supra* note 67, at 1107; Michael McConville, *Silence in Court*, 137 NEW L.J. 1169 (1987).

<sup>169</sup> Jackson, *supra* note 3, at 107.

<sup>170</sup> *See Ashworth & Creighton, supra* note 2, at 123.

<sup>171</sup> *See Greer, supra* note 3, at 724. Tom King, then secretary of state for Northern Ireland, told Parliament that "many people would think we were mad" not to permit the courts to draw adverse inferences. *Id.*

<sup>172</sup> *Id.* at 723-24.

<sup>173</sup> EASTON, *supra* note 3, at 78. Because the evidence on which these figures were based has never been revealed, it is impossible to verify or challenge this assertion. *Id.*; *see also* Galligan, *supra* note 37, at 74.

<sup>174</sup> Galligan, *supra* note 37, at 74.

<sup>175</sup> Greer, *supra* note 3, at 720 (citations omitted).

<sup>176</sup> Galligan, *supra* note 37, at 74.

that exercising the right frustrated the prosecution of crime. Although these numbers rose somewhat in the years following PACE,<sup>177</sup> the difference was inconsequential.<sup>178</sup> Such figures do not support the popular quid pro quo approach to restricting the right to silence in this situation, which allegedly arose out of the reinforced legal safeguards offered by PACE.

There has been minimal research done on the exercise of the right in post-Order Northern Ireland.<sup>179</sup> In a survey of 121 contested cases in Belfast Magistrates' Court and Crown Court, carried out in a period which overlapped the introduction of the Order, 75 percent of defendants gave evidence in Magistrates' Court while 48 percent gave evidence in the Crown Court.<sup>180</sup> While these numbers may seem relatively lower than those cited for pre-trial questioning, it is instructive to note that the percentages remained the *same* following introduction of the Order.<sup>181</sup> Overall, these numbers point to two conclusions: first, that the government greatly exaggerated the importance and use of the right to silence, and second, that limited research shows that the Order has yet to provide a compelling incentive for suspects to waive this "right."

In court, the Order has generally been interpreted cautiously.<sup>182</sup> Judges have gone to great pains to emphasize that inferences from silence will not alone be sufficient to justify a *prima facie* case or a conviction.<sup>183</sup> The Order, in addition, has not yet been used to bolster a weak government case and support a conviction.<sup>184</sup> As *R. v. Murray* shows, however, the Order has been used to the government's advantage, in that case to justify strong adverse inferences against a defendant who sprung an ambush defense and later refused to give evidence.<sup>185</sup>

<sup>177</sup> See Jackson, *supra* note 3, at 107 n.1; Greer, *supra* note 3, at 721.

<sup>178</sup> See Galligan, *supra* note 37, at 74.

<sup>179</sup> See Jackson, *supra* note 36, at 409.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> See *supra* notes 137–165 and accompanying text. A possible reason for the caution may be judicial fear of the slippery slope of widespread application of a statutorily-imposed rule of evidence which has no standards for the types of inferences to be drawn. See EASTON, *supra* note 3, at 74.

<sup>183</sup> See *R. v. Murray*, at \*38 (Court of Appeal (N.I.), Oct. 25, 1991), available in LEXIS, Intlaw Library, Nircas File; *R. v. McDonnell*, (Belfast Cr. Ct., Mar. 13, 1989), available in LEXIS, Intlaw Library, Nircas File.

<sup>184</sup> See Jackson, *supra* note 3, at 414.

<sup>185</sup> See *R. v. Murray*, (Cr. Ct. N. Ir., Jan. 18, 1991), available in LEXIS, Intlaw Library, Nircas File.

The irony of the Order and its effect on criminal law in Northern Ireland, however, is how significantly it resembles the pre-Order state of the law.<sup>186</sup> The right to silence at common law was only a right to remain silent—the consequences of which were unprotected and might manifest themselves in instructions from the bench outlining permissible adverse inferences. *Chandler* explicitly abrogated any notion of a common law rule against drawing adverse inferences.<sup>187</sup>

Thus it is hardly surprising that the courts interpreting the Order have used the common law privileges as further justification for the employment of adverse inferences. In *Murray*, the bench asserted that at common law the trial court was entitled to comment on the failure to testify at trial.<sup>188</sup> Moreover, the opinion flatly stated that the common law entitled the trier of fact to draw adverse inferences from the failure of a suspect to offer any explanation to police or from a defendant's refusal to give evidence.<sup>189</sup> If this view from the bench is accurate, as it appears to be,<sup>190</sup> it is difficult to understand the controversy over the right to silence in the United Kingdom—in this light, the Order seems more a codification of a common law “privilege,” rather than a radical curtailment of a common law “right.”<sup>191</sup>

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<sup>186</sup> Empirical evidence, however, will never be able to determine with any finality whether there is a distinction between the right to comment on silence to the jury and the right to direct that jury to draw adverse inferences. Practically speaking, from notions of human nature, it seems difficult to argue that there is a distinction between the two. See EASTON, *supra* note 3, at 63–64.

<sup>187</sup> See *supra* note 60 and accompanying text.

<sup>188</sup> *R. v. Murray*, at \*9–10 (Cr. Ct. N. Ir., Jan. 18, 1991), available in LEXIS, Intlaw Library, Nircas File.

<sup>189</sup> *Id.*

<sup>190</sup> See *supra* notes 163–165.

<sup>191</sup> More persuasive objections can be raised on the grounds that the Order has been enacted to apply only to Northern Ireland. Since 1969, the province has been torn apart by political violence, civil disturbance and paramilitary activity, stemming from deep divisions in the populace over the legitimacy of the presence of the British government in Northern Ireland. See generally JOHN E. FINN, *CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW* (1991); JUSTICE UNDER FIRE: *THE ABUSE OF CIVIL LIBERTIES IN NORTHERN IRELAND* (A. Jennings ed., 1988); *NORTHERN IRELAND: THE BACKGROUND TO THE CONFLICT* (J. Darby ed., 1983). The “Troubles” have spawned pervasive emergency legislation in Northern Ireland which has already shifted the balance between individual and state heavily in the state's favor, through emergency police powers, the use of delegated legislation and the denial of jury trials in certain cases. EASTON, *supra* note 3, at 80. Professor Easton argues that the case for retention of the right to silence applies even more strongly in Northern Ireland precisely because this legislation has already severely diminished individual rights. *Id.*

## B. *Silence: Rights and Privileges*

Nevertheless, one might ask whether the right to silence ought to be any more than a privilege. This section will attempt to analyze the general arguments for and against a right to silence which protects the criminal suspect from adverse inferences. Any assessment of this question requires an examination of the competing policies which underlie the notions of silence as a right and privilege.

The right to silence in the United Kingdom operates as more of a privilege bestowed upon criminal defendants in certain situations than it does a right of criminal defendants subject to exceptions in certain situations. A "right" to silence, however, means more than just the absence of a legal obligation to talk to police or to testify in court.<sup>192</sup> A criminal defendant's "right" to silence consists of the right to be free from having that silence used against him, in the form of adverse inferences drawn at trial.<sup>193</sup> Because the British "right to silence" does not as a baseline protect that right, it is really a misnomer. It is not so apparent why adverse inferences may still be used against a criminal defendant in the United Kingdom, the country from which the U.S. derived its classic Fifth Amendment rights.<sup>194</sup>

### 1. The Government's Case

The movement which resulted in the Criminal Evidence (N.I.) Order 1988 rests its case on three fundamental propositions. The first is that it is counterintuitive to argue that adverse inferences should not be drawn from silence, in that such silence is inherently probative of guilt.<sup>195</sup> Secondly, there is a widespread perception that the right hinders the prosecution of crime, particularly with regard to the "ambush defense."<sup>196</sup> The final proposition revolves around the notion that, given the added procedural safeguards of the Police and Criminal Evidence Acts, the right is an anachronism.<sup>197</sup> This is the quid pro quo argument advanced by both scholars and jurists. All three of these propositions are fundamentally flawed.

The first argument, that the right is counter to common sense,

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<sup>192</sup> See Greer, *supra* note 3, at 710; see also Galligan, *supra* note 37, at 76–77.

<sup>193</sup> See Greer, *supra* note 3, at 710.

<sup>194</sup> See *supra* note 77.

<sup>195</sup> See EASTON, *supra* note 3, at 62–65.

<sup>196</sup> See *supra* notes 36–41.

<sup>197</sup> See *supra* note 55.

takes its cue from Bentham's clichéd maxim, "innocence claims the right of speaking, as guilt invokes the privilege of silence."<sup>198</sup> Professor Glanville Williams argues that the right to be free from adverse inferences drawn from silence is contrary to common sense because "[i]t runs counter to our realisation of how we ourselves would behave if we were faced with a criminal charge."<sup>199</sup> The case law is filled with similar aphorisms.<sup>200</sup>

However inviting such a theory may be, it is only that—theory. It fails to consider two things. First, it ignores the fact that many of the rules of evidence shared by both the United Kingdom and the United States are inherently counterintuitive. This is so because they are rules which reflect considerations other than truth-seeking which are important to the process of criminal justice, such as reliability and protection against unfair prejudice.<sup>201</sup> Secondly, the argument dismisses the numerous other reasons for silence.<sup>202</sup> In their stead, it posits only one—the guilt of the criminal suspect. Common sense, then, is hardly a reliable guide in this context because it may wrongly equate silence with guilt.<sup>203</sup>

The second proposition supporting the notion that adverse inferences should be drawn from silence is that the exercise of such a right otherwise frustrates police investigation and prosecution of crime.<sup>204</sup> The empirical research strongly disputes this proposition. In the first place, the findings show that confessional evidence is only crucial in about 20 percent of the cases; in the rest, it provides only evidence of a supportive nature.<sup>205</sup> Moreover, the data suggests

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<sup>198</sup> See *supra* note 18.

<sup>199</sup> Williams, *supra* note 67, at 1107.

<sup>200</sup> See *R. v. Chandler*, [1976] 1 W.L.R. 585, 590 ("we are bound by *Rex v. Christie*, not by *Hall v. The Queen* and *Christie*, in our judgment does accord with common sense"); *R. v. Sparrow*, [1973] 1 W.L.R. 488, 493; *R. v. Wood*, [1911] 7 Crim. App. 56, 58 (judge's direction to the jury relating to drawing the inference of intent from defendant's refusal to explain his presence at the crime scene was "a mere commonsense statement.").

<sup>201</sup> See Galligan, *supra* note 37, at 72–73.

<sup>202</sup> See EASTON, *supra* note 3, at 54. Defenders of the right to silence point out that there are many reasons for silence other than guilt—such as fear, embarrassment, anxiety, the desire to protect someone else, outrage, or anger—which are consistent with innocence. *Id.* Additionally, weaker, less educated, inarticulate, and poorer defendants may fear, with good reason, being misunderstood during interrogation or cross-examination. *Id.* at 61.

<sup>203</sup> See *id.* at 63–64 ("[G]iven that common sense is unreliable, untested, impressionable and unsystematic, it would seem a curious model for the law to follow.").

<sup>204</sup> *Why Silence is a Right*, 138 NEW L.J. 737 (1988). Metropolitan Police Commissioner Sir Peter Imbert stated in 1987 that abolition of the right to silence would be "the most important single step legislators could take to control and reduce crime." *Id.*

<sup>205</sup> Galligan, *supra* note 37, at 74.



that of the small percentage of suspects who do refuse to answer questions, the vast majority are convicted anyway.<sup>206</sup> Such figures do not constitute specious reasoning; indeed, they refute the British police lobby.<sup>207</sup>

Closely related to this proposition is the argument that the guilty are abusing their right to silence.<sup>208</sup> By portraying the right as the refuge of the guilty, modern abolitionists are continuing to endorse Bentham's nineteenth century logic. Again, empirical evidence for such an assertion is slim.<sup>209</sup> Moreover, this argument is not persuasive because in itself the use of a privilege or a right in criminal procedure "does not negate its value or constitute a reason for abandoning it."<sup>210</sup> It is not enough to say that the right to silence protects more guilty defendants than innocent ones.<sup>211</sup>

Finally, the last proposition submitted by the government is that with the enactment of PACE, the right to silence is rendered unnecessary.<sup>212</sup> Because the PACE-reinforced right of access to a solicitor confers upon the criminal defendant an additional weapon with which to trump police, a quid pro quo waiver of his right to silence is thus in order.<sup>213</sup> A.A.S. Zuckerman, a leading proponent of this

<sup>206</sup> *Id.* The pre-PACE studies showed that silence was not effectively preventing convictions—these analyses concluded that "many . . . silent suspects pleaded guilty; that 'ambush' defenses were rarely responsible for acquittals; and that 'those defendants viewed by the police as professionals . . . confess[ed] at about the same rate as others.'" Dixon, *supra* note 3, at 37 (citations omitted). The post-PACE research shows that these propositions remain generally true. See *infra* notes 218–225.

<sup>207</sup> But see David Dixon, *Common Sense, Legal Advice and The Right of Silence*, PUB. L. 233, 248 (1991). The author noted that empirical evidence demonstrating the relative insignificance of confessional evidence may understate the significance of cases which are not taken to court because of a suspect's silence. *Id.*

<sup>208</sup> See EASTON, *supra* note 3, at 49.

<sup>209</sup> *Id.* ("A remarkable feature of the right to silence debate has been that so far very little evidence has been offered to support the assertion that the guilty are abusing the right to silence. . . ."). A 1992 survey by Michael Zander, professor of law at London School of Economics, found that only 10 percent of defendants exercised their right of silence with respect to any questions, and that "ambush defenses" caused serious problems in only 2 percent of the cases, according to the Crown Prosecution Service. *U.K.: Evidence 'Tainted by Police Behaviour in 500 Cases a Year'*, Reuters, Dec. 9, 1992, available in LEXIS, Europe Library, Allnews File.

<sup>210</sup> EASTON, *supra* note 3, at 53 ("The principle of equal concern and respect demands that both the guilty and innocent are afforded procedural protections.").

<sup>211</sup> See Ellis, *supra* note 7, at 845. Ellis argues that this has always been assumed, and notes that even critics of the Fifth Amendment right recognize that most Americans agree that it is better to let a considerable amount of guilty persons go free than to convict any innocent persons. *Id.*

<sup>212</sup> See ANNUAL REVIEW, *supra* note 55, at 146–47.

<sup>213</sup> See *id.*

theory of “exchange abolitionism,”<sup>214</sup> maintains that because PACE has prescribed minimum standards for procedural fairness, the right to silence is no longer necessary to serve those needs.<sup>215</sup> This proposition, however, rests on shaky foundations—it assumes that access to legal advice and other procedural safeguards removes any legitimate reason for a suspect to remain silent.<sup>216</sup> As demonstrated previously, a suspect’s silence is not necessarily the product of wholly legal concerns.<sup>217</sup>

Besides relying on these unsteady assumptions, such an argument fails to comport with the reality of the post-PACE police station analyzed in *Public Law*.<sup>218</sup> This examination of the right to silence in the context of a post-PACE police station revealed that many of the standard assumptions about the presence of solicitors were misleading. Because the British criminal justice system, much like that in the United States, is not in practice “adversarial,” the result is that the police “often perceive considerable advantages from a legal adviser’s presence.”<sup>219</sup> The study found that, for the most part, the role of the solicitor in the police station was to explain the benefits of cooperation and *discourage* silence.<sup>220</sup> Where the relationship between solicitor, criminal suspect, and police is seen as intrinsically sociological, as opposed to legalistic, this study argued that the quid pro quo thesis is misleading.<sup>221</sup>

In addition, the quid pro quo rationale just does not hold up when scrutinized empirically.<sup>222</sup> The post-PACE studies simply do not support the notion that increased access to legal advice has increased suspects’ reliance on the right to silence.<sup>223</sup> Moreover, one study found that 78 percent of an interview sample of British police

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<sup>214</sup> Greer, *supra* note 3, at 721.

<sup>215</sup> See *id.* at 722 (citing A.A.S. ZUCKERMAN, *THE PRINCIPLES OF CRIMINAL EVIDENCE* 302–41 (1989)).

<sup>216</sup> Greer, *supra* note 3, at 722.

<sup>217</sup> See *supra* note 202.

<sup>218</sup> See generally Dixon, *supra* note 207, at 235–54.

<sup>219</sup> *Id.* at 239.

<sup>220</sup> *Id.* at 243, 252. Because confessions and guilty pleas are “the oil in the system,” none of the legal advisers whom Dixon interviewed advised silence as a matter of course. *Id.* at 252. As a blanket rule such advice was thought to be “wholly pointless.” *Id.* at 243.

<sup>221</sup> See *id.* at 253.

<sup>222</sup> Dixon, *supra* note 3, at 37–41.

<sup>223</sup> *Id.* Three major studies, including one undertaken by the author in 1990, belie the claim that PACE has substantially changed reliance on the right to silence. *Id.* at 37–40. A fourth “limited survey” by the Metropolitan Police, which purportedly generated more favorable statistics for the abolitionists, has been acknowledged as methodologically flawed by its own researchers. *Id.* at 40.

constables, sergeants and inspectors themselves felt that PACE had no effect whatsoever on criminal defendants' exercise of the right to silence.<sup>224</sup> Indeed, the most comprehensive analysis of the post-PAVE empirical studies concluded that "[a]ll the available, reliable research now tells the same story . . . [that] PACE has not significantly increased the use of silence . . . [and that] silence does not reduce the rate at which suspects are charged or convicted."<sup>225</sup>

## 2. The Case for the Right to Silence

A right to silence which incorporates the right to not have that silence used against one at trial should be restored to the British system of criminal justice.<sup>226</sup> The case for a rehabilitated right along the lines of the Fifth Amendment privilege against self-incrimination has at its heart two fundamental assertions. First, without this right, the baseline attributes of the accusatorial system of criminal justice, the government's burden of proof and the defendant's presumption of innocence, are seriously undermined.<sup>227</sup> Secondly, such a right protects values inherently important to any system of criminal justice which should not be sacrificed to fulfill the system's truth-seeking function.

The "traditional" argument which supports a right to silence free from adverse consequences relies upon the idea that the preservation of such a right is essential to the maintenance of the accusatorial system of criminal justice in the common law tradition.<sup>228</sup> The system's foundations are the prosecution's burden of proving guilt

<sup>224</sup> *Id.* at 38. Those interviewed compromised law enforcement personnel "with current operational experience, in contrast to the senior officers who publicly complain about PACE . . . ." *Id.*

<sup>225</sup> *Id.* at 41 (citations omitted).

<sup>226</sup> See Ashworth & Creighton, *supra* note 2, at 133. The authors argue that "[i]f the right is soundly based in the prevailing context of English criminal justice . . . then one should look towards reestablishing the right, rather than reasoning that there are so many erosions of the right already that its further curtailment will not be a step of great significance." *Id.*

<sup>227</sup> A corollary of this argument is the "lazy prosecutor" argument; that, by relying on the individual as the source of its case, the prosecution's incentive to obtain other evidence will be weakened and it may encourage improper practices. EASTON, *supra* note 3, at 111.

<sup>228</sup> See Greer, *supra* note 3, at 725; *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (privilege against self-incrimination is "the essential mainstay of our adversary system . . .").

It has also been argued that the debate in the United Kingdom about the right to silence "is as at least as much about its symbolic significance as it is about its practical value." Greer, *supra* note 3, at 724. This theory of symbolic retentionism, as author Stephen Greer calls it, was echoed by American legal scholar David Dolinko when he said that "a rule whose existence lacks any principled justification may nevertheless come to serve important functions in the legal system as a whole, so that its repeal would do violence to the entire system." David

beyond a reasonable doubt and the presumption of the defendant's innocence.<sup>229</sup> The implicit corollary to these foundations is that the burden of proof necessarily requires that the government meet that burden solely through its own labor, rather than, as the *Miranda* court wrote, "by the cruel, simple expedient of compelling it from [the defendant's] own mouth."<sup>230</sup> Because logic dictates that the only inferences to be drawn from silence are ones adverse to the defendant, permitting such inferences to be drawn directly or indirectly invariably weakens the state's burden of proof by making it easier to convict in cases in which evidence of silence is introduced.<sup>231</sup>

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Dolinko, *Is There a Rationale for the Privilege against Self-Incrimination?*, 33 U.C.L.A. L. REV. 1063, 1077-78 (1986). D.J. Galligan expressed the theory in cultural terms, noting that it provides important symbols about how individuals stand vis-à-vis a culture and its legal authority. See Galligan, *supra* note 37, at 85.

<sup>229</sup> See EASTON, *supra* note 3, at 108 (citations omitted). In *Woolmington v. DPP*, the court stated that the "golden thread running through the web of English law" was the state's burden of proof and that "no attempt to whittle it down can be entertained." See *id.* at 170; Greer, *supra* note 3, at 725.

<sup>230</sup> *Miranda*, 384 U.S. at 460 (citing *Chambers v. Florida*, 309 U.S. 227, 235-38 (1940)).

To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load' . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors . . . )

*Id.*

There is an inconsistency of principle in requiring the onus of proof at trial to be upon the prosecution and to be discharged without any assistance from the accused and yet in enabling the prosecution to use the accused's silence in the face of police questioning under caution as any part of their case against him at trial.

See RCCP, *supra* note 95, at 86.

Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation. 'The law will not suffer a prisoner to be made the deluded instrument of his own conviction.'

*Watts v. Indiana*, 338 U.S. 49, 54 (1949) (citation omitted).

<sup>231</sup> See Greer, *supra* note 3, at 725. Greer argues that this is inevitable because the drawing of adverse inferences "will obviously have their greatest impact where the prosecution case is at its weakest . . . [for example] where good forensic evidence, reliable confessions, and reliable testimony from other witnesses is absent." *Id.* The Criminal Law Revision Committee, which recommended curtailment of the right to silence, acknowledged as much in its report when it said that "failure to give evidence may be of little or no significance if there is no case against [defendant] . . . or only a weak one. But the stronger the case is [sic] the more significant will be his failure to give evidence." C.L.R.C. REPORT, *supra* note 42, at 69.

In contrast, Glanville Williams argues that such an argument is illogical, given that the judge or jury must still be satisfied beyond a reasonable doubt of a defendant's guilt on the evidence presented. Williams, *supra* note 67, at 1108. Williams asserts that reasonable changes in the

The second and perhaps more influential argument for a re-worked right to silence arises from the notion that such a right is necessary to the protection of values inherently important to the British system of criminal justice—values which should not be sacrificed to fulfill the system's truth-seeking function.<sup>232</sup> The Supreme Court remarked in *Miranda* that the privilege against self-incrimination is "founded on a complex of values."<sup>233</sup> This "complex of values" which, it is argued, justifies the Fifth Amendment privilege against self-incrimination, has been the subject of intense scholarly scrutiny, much of it critical.<sup>234</sup> A strong case exists, however, for justifying a renewed right to silence in the United Kingdom on the grounds that it protects values fundamental to any system of criminal justice, values which can generally be grouped under the heading "fairness."

The right to silence unencumbered by the possibility of adverse evidentiary consequences is necessary because the present state of the law is fundamentally unfair to criminal defendants. Indeed, it is

law of evidence to allow direct adverse inferences would merely aid the prosecution in "discharging" its burden of proof, as opposed to *shifting* that burden. *Id.* This argument is at best technically correct, and is more a product of semantics than it is logic. Although the prosecution would still have to prove its case beyond a reasonable doubt, potentially significant evidence is now at its disposal, making it easier to "discharge" that burden. See Galligan, *supra* note 37, at 87. Additionally, where comment is permitted on silence, Easton argues that the whole focus of the trial shifts to the defendant, whose explanation or failure to supply an explanation becomes the focal point of the case, and in fact shifts a share of the burden onto the defendant. EASTON, *supra* note 3, at 110.

<sup>232</sup> See Dixon, *supra* note 207, at 247. Dixon notes that this "truth-seeking" function does not necessarily operate as such because "the 'truth' is not always objective or clear-cut. It sometimes has to be worked out, constructed, rationalized, negotiated. Police interrogation is therefore not just a process of discovering the 'truth', but is also a process of constructing it." *Id.* (citation omitted); see also EASTON, *supra* note 3, at 98–99. The author points out that constraints on the goal of rectitude are already accepted as legitimate in criminal procedure, including the "moral imperative that it is better for the guilty to be acquitted than to establish guilt by unjust means which violate human rights and dignity." Dixon, *supra* note 207, at 98. Moreover, it is argued that the legitimacy of the verdict incorporates both a factual dimension of accuracy as well as a moral dimension of the judgment's moral integrity. *Id.* at 101 (citation omitted). This moral authority of the verdict would be undermined if it were to be founded on violations of fundamental values of criminal law, such as "the right of all citizens to equal respect and dignity, recognition of autonomy and freedom of individuals . . ." *Id.*

<sup>233</sup> *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (citing *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55–57 n.5 (1964)); *Tehan v. Shott*, 382 U.S. 406, 414–15 n.12 (1966).

<sup>234</sup> See generally Dolinko, *supra* note 228; Lisa Tarallo, *The Fifth Amendment Privilege Against Self-Incrimination: The Time Has Come for the United States Supreme Court to End Its Silence on the Rationale Behind the Contemporary Application of the Privilege*, 27 NEW ENG. L. REV. 137, 137–88 (1992); Barbara Rook Snyder, *A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials*, 29 WM. & MARY L. REV. 285, 309–12 (1988); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968).

*especially* unfair in Northern Ireland, where the criminal justice system as a whole has been under constant attack from human rights groups for over twenty years.<sup>235</sup> The "fairness" argument is rooted in both legal philosophy and procedural reality, and encompasses a range of values which the criminal justice system professes to protect.

A restored right to silence would afford substantially more protection to the individual defendant's right to privacy, or the "right to a private enclave where he may lead a private life," as it was characterized by the Supreme Court.<sup>236</sup> Because privacy protects personal identity and autonomy, or "personality," it has stature as a right and thus is important enough to justify imposing duties on others to protect it.<sup>237</sup> The right to silence, in turn, protects privacy, in that it bars the state from intruding "into the private inner sanctum of individual feeling and thought" and imposes no conditions on that prohibition.<sup>238</sup>

Critics of the privacy theory of justification have pointed out correctly that many crimes contain a mental element which the government attempts to prove by obtaining information about the

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<sup>235</sup> The years 1992-93 alone saw the publication of several reports highly critical of the criminal justice system in Northern Ireland. Amnesty International's 1991 Annual Report, released in June 1992, revealed that "[c]ivilian deaths, unfair trials and ill-treatment of suspects in Northern Ireland continued to mar Britain's human rights record . . . ." *Ulster Still Taints Britain's Human Rights Record—Amnesty*, Press Association Newsfile, July 9, 1992, available in LEXIS, Europe Library, Allnws File. Earlier that summer, the Haldane Society published a report which called for urgent reform of the system, charging that the Diplock court system bordered on "conveyor belt justice," and noting that the issue " . . . is not miscarriage of justice; but that the [emergency legislation] does not provide an adequate 'carriage' for justice in the first place." David Sharrock, *UK: Call to Halt Ulster Murder Trials—Haldane Society*, Reuter Textline, June 9, 1992, available in LEXIS, Europe Library, Allnws File. Moreover, the "abrogated" right to silence under the 1988 Order has drawn constant criticism from these groups—a 1993 Amnesty report concluded that the "abolition" of the right to silence under the Order may have increased the risk of innocent people being convicted. Owen Bowcott, *UK: Amnesty Attacks Abolition of Right to Silence in Ulster Courts*, Reuter Textline, Feb. 12, 1993, available in LEXIS, Europe Library, Alleur File. This report further warned that the Order has "significantly diminished an essential component of fundamental rights guaranteed by international standards." *Id.*; see also Denis Campbell, *UK: 18 Jailed Irishmen 'May Be Innocent,'* THE IRISH TIMES, July 17, 1992, available in LEXIS, Europe Library, Alleur File.

<sup>236</sup> *Miranda*, 384 U.S. at 460 ("that right is the hallmark of our democracy").

<sup>237</sup> Galligan, *supra* note 37, at 88-89; *Miranda*, 384 U.S. at 460 (privilege is justified because it respects "the inviolability of the human personality . . ."). (citation omitted).

<sup>238</sup> *Couch v. United States*, 409 U.S. 322, 327 (1973) ("By its very nature, the privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation."); see also Galligan, *supra* note 37, at 88-89.

defendant's mental thoughts, knowledge, feelings, and beliefs.<sup>239</sup> Critics ask why it would be a more serious intrusion to procure that information from the defendant himself.<sup>240</sup> The answer, it seems, is one that links the privacy theory to fairness—requiring an individual to participate in his own personal downfall inexorably degrades the dignity of the individual.<sup>241</sup> Fair play under the accusatorial system requires that the State respect “the inviolability of the human personality” by according the criminal defendant an unqualified right to silence.<sup>242</sup>

In addition to articulating more philosophically-oriented concerns such as privacy and human dignity, “fairness” for the criminal defendant in this context also implicates procedural concerns. In the first place, a restored right to silence inevitably decreases the risk of false confessions, a procedural safeguard which clearly reduces the possibility of unfair convictions.<sup>243</sup> Although, again, this position is not without its counter-arguments,<sup>244</sup> it is likely that the use of adverse inferences actively discourages a suspect's use of silence during interrogation, thus concomitantly increasing the pressure to speak and risk misinterpretation or even manipulation at the hands of the police.<sup>245</sup> Beyond reducing the risk of false confessions, an unqualified right to silence is immeasurably more

<sup>239</sup> Dolinko, *supra* note 228, at 1110.

<sup>240</sup> *Id.*

<sup>241</sup> MARK BERGER, *TAKING THE FIFTH* 32 (1980); see also Robert S. Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87, 89–91 (1970). Gerstein sets out a compelling case for the privacy rationale behind the privilege against self-incrimination. He argues that although the guilty would seem to have far less of a moral claim to exclusive control over information regarding himself, the public admission of the private judgment of self-condemnation is a revelation of a peculiarly private character. *Id.* at 90–91; see also *Couch*, 409 U.S. at 327. This idea was eloquently expressed, Gerstein asserts, by Justice Fortas of the Supreme Court when he said: “a man may be punished, even put to death by the state; but . . . he should not be made to prostrate himself before its majesty. Mea culpa belongs to a man and his God. It is a plea that cannot be extracted from free men by human authority.” *Id.* (citing Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 1125 CLEV. B. ASS'N J. 91, 98–100). Critics have dismissed such notions as substituting emotion for reason, because allegedly self-evident propositions are “the usual refuge of a judge who cannot articulate a satisfactory reason.” Ellis, *supra* note 7, at 838 (citing Friendly, *supra* note 234, at 683).

<sup>242</sup> *Miranda*, 384 U.S. at 460 (“The constitutional foundation underlying the privilege is the respect a government—state or federal—must accord its citizens.”).

<sup>243</sup> Greer, *supra* note 3, at 726.

<sup>244</sup> See Galligan, *supra* note 37, at 86.

<sup>245</sup> Greer, *supra* note 3, at 726; see Dixon, *supra* note 207, at 247 (“Once initial suspicion has been established, the working practice of many police investigators is to confirm that suspicion and prove the suspect's involvement, not to seek to establish the truth. In such circumstances, many suspects are unable to deal with questioning and literally talk themselves into trouble.”).

fair to the criminal defendant because it inherently recognizes that there are a host of "innocent" reasons why that defendant would choose to remain silent in interrogation or at trial.<sup>246</sup> Finally, the protected right to silence alleviates reliability concerns articulated by the "distrust of self-deprecatory statements."<sup>247</sup> It can be argued that the right to silence as it is conceived here, similar to the Fifth Amendment "privilege" against self-incrimination, can be justified by its fundamental link to fairness concerns, concerns not unlike those captured by the U.S. notion of due process of law.<sup>248</sup>

### 3. Verdict

Parliament should rescind the Criminal Evidence (N.I.) Order 1988 and implement a right to silence in both Northern Ireland and the rest of the United Kingdom. This right is necessary to protect the criminal defendant's invocation of silence from working against him at trial. At both common law and under the Order, adverse inferences are clearly drawn by the trier of fact from a defendant's silence in the face of police accusation as well as from the defendant's refusal to testify. Although the Order authorizes and even encourages the direct drawing of adverse inferences in specific situations, an examination of the common law has made it clear that the Order is only accomplishing directly what was indirectly permissible at common law. Such evidentiary consequences place an impermissible burden on a criminal defendant's exercise of his "right."<sup>249</sup> Its practical effect, as the Supreme Court has noted, is to replace the right to silence with a duty to incriminate oneself.<sup>250</sup> Such a dilemma has no place in the British system of criminal justice, which holds itself out as embodying "the tradition of scrupulous fairness to the accused."<sup>251</sup>

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<sup>246</sup> See Greer, *supra* note 3, at 727; EASTON, *supra* note 3, at 54.

<sup>247</sup> Ellis, *supra* note 7, at 843-44. Ellis notes that there may be compelling reasons to be wary of such statements—even a voluntary confession may be merely "an act of self-punishment or self-abnegation" by an innocent man, rather than a "disclosure of truth by one morally impelled to acknowledge his misdeeds." *Id.* at 844 (citation omitted).

<sup>248</sup> See Snyder, *supra* note 234, at 338 ("Although neither the commentators nor the Supreme Court has developed a comprehensive and precise definition of the concept of due process, most commentators and the Court have considered the idea of fairness to be dominant."). Moreover, commentators have noted that "[t]he American notion of due process of law grew out of a provision of the Magna Carta . . . ." *Id.*

<sup>249</sup> See *Jenkins v. Anderson*, 447 U.S. 231, 250 (1979) (Marshall, J. dissenting).

<sup>250</sup> *Id.*

<sup>251</sup> Van Kessel, *supra* note 51, at 7-8 (citing Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1235 (1932)).



## CONCLUSION

The controversy over the implementation and impact of the Criminal Evidence (N.I.) Order 1988 upon the criminal suspect's right to silence is essentially misleading rhetoric.<sup>252</sup> There is no rule at common law which prevents the drawing of adverse inferences from silence. Indeed, because such inferences are judicially permissible the "right" tends to operate more like a "privilege" accorded in certain situations. Thus, the Order does not represent a substantive change in the criminal evidence law of Northern Ireland.

It indicates, however, that the United Kingdom affords the criminal suspect who declines to answer questions or testify at trial substantially less protection than that provided by the Fifth Amendment. Because the right to be free from adverse inferences is essential in an accusatorial system of criminal justice, the right to

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<sup>252</sup> The controversy continued to be a burning issue in the wake of the Maxwell scandal of late 1991 and 1992. Ian and Kevin Maxwell, sons of the late publisher Robert Maxwell, were under investigation by the Serious Fraud Office in relation to their father's alleged mishandling of corporate pension funds. See *Silence in the House*, THE TIMES (London), Jan. 14, 1992, available in LEXIS, Europe Library, Allnws File. The brothers asserted their right to silence before the House of Commons Social Security Select Committee, in connection with the missing pension funds, and their assertion caused an uproar. *Id.* It also sparked an interesting debate between politicians, the bar, the press, and the public, in which competing notions of the right to silence have been bandied about. See Duncan Heenan, *Innocent Have No Need of Silence*, FIN. TIMES, Feb. 1, 1992, available in LEXIS, Europe Library, Allnws File ("The so-called right to silence is claimed on the ground of avoiding incriminating oneself. How ridiculous! In a just society the guilty should be encouraged to incriminate themselves, and the innocent would not be able to do so by telling the truth."); Lord Hailsham, *Bring Common Sense into the Courtroom*, THE TIMES (London), Jan. 19, 1992, available in LEXIS, Europe Library, Allnws File (author argues that "there are more sacred cows in our law of criminal evidence and procedure than would fill the Smithfield market in a decade . . . this train of thought [has led to] . . . almost ludicrous artificiality, complication, and want of logic . . ."); *Silence Right Eroded in Law*, THE TIMES (London), Jan. 14, 1992, available in LEXIS, Europe Library, Allnws File ("Such a right, if it exists, is in the class of moral or natural rights, 'inalienable' as the American constitution terms them, which idealists view as valid apart from their recognition by legislation, but which cynics dismiss (in Burke's famous phrase) as 'nonsense on stilts.'"). The controversy over whether the right to silence existed before Parliamentary committees reached the Court of Appeal, which ruled that it only applies in a limited manner because of the special powers given to liquidators under statute. See *Maxwell's Son Loses Court Battle on Right to Silence*, REUTERS, Feb. 3, 1992, available in LEXIS, Europe Library, Allnws File. The debate over the right to silence continued unabated into 1993. See, e.g., *Right to Silence*, DAILY TELEGRAPH, Mar. 5, 1993, available in LEXIS, Nexis Library, Omni File; *We Must Maintain Our Right to Silence*, INDEPENDENT, Feb. 8, 1993, available in LEXIS, Nexis Library, Omni File ("This principle should not be thrown away for the sake of a few bad cases and political expediency."); *Freedom for Baby Death Parents Who Remain Silent*, DAILY TELEGRAPH, Jan. 16, 1993, available in LEXIS, Nexis Library, Omni File.

silence in the United Kingdom should be reworked to protect that right. Currently, the right to silence in the United Kingdom, with or without the Criminal Evidence (N.I.) Order, is an unfortunate example of the proposition that while the rhetoric of legality may hold out certain rights, the reality of the law and its practice do not necessarily protect or include those rights.<sup>253</sup>

*Richard Maloney*

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<sup>253</sup> See Dixon, *supra* note 207, at 250–51 (citation omitted).